Petition

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

In the Matter of:
ALDERSGATE FOUNDATION, INC.,

FRIENDLY RETIREMENT CENTER, INC.,
Petitioner

vs.

LEE JAY COLLING, Successor Trustee,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED FOR REVIEW

Whether Petitioner is entitled to notice and a hearing prior to the entry of forfeiture by a court *sua sponte* for breach of contract.

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OPINIONS BELOW

The opinions of the Court of Appeals and the District Court have not been published. These opinions appear at Appendices A,B,C,E, and F.

JURISDICTIONAL STATEMENT

This is a petition to review the decision of the Court of Appeals for the Fifth Circuit in the case of *Friendly Retirement Center, Inc. v. Lee Jay Colling, Successor Trustee*, rendered on September 4, 1981. (Appendix A). Petitioner's motion for rehearing was denied on October 15, 1981. (Appendix B). The jurisdiction of this Court to review the above-mentioned decisions by writ of certiorari is invoked under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE AND OF THE FACTS

On January 12, 1979, the Bankruptcy Judge of the United States District Court entered an order *sua sponte* (Appendix F),

forfeiting the $500,000 earnest money deposit delivered by Petitioner to Respondent in regard to the purchase of certain real property located in or near Kissimmee, Florida, and owned by Aldersgate Foundation, Inc. a bankrupt debtor. The deposit was made pursuant to the Bankruptcy Court's acceptance of Petitioner's bid to purchase the Aldersgate property in a bankruptcy proceeding under Chapter X of the Bankruptcy Act. On October 6, 1978, the Bankruptcy Judge entered an Order (Appendix I), stating:

> If Friendly [Petitioner] has not executed this Contract For Sale and Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been ordered by this Court to be treated as a forfeitable earnest money deposit.

Petitioner complied with this Order by executing the Contract for Sale and Purchase. (Appendix H). The contract itself provided in part:

> If the Buyer fails to perform any of the covenants of this Contract within the time specified the deposits held by Seller, together with interest accrued thereon, shall be retained by and for account of the Seller as consideration for the execution of this Contract and in full settlement of any claims for damages and all parties shall be relieved of all obligations under this Contract or the Seller, at its option, may proceed at law or in equity to enforce its legal rights under this Contract including but not limited to, the right to bring suit for specific performance.

The Order of October 6, 1978 further set the closing date for the sale and purchase of the Aldersgate property for December 12, 1978, but the closing date was extended to December 31, 1978. Petitioner was unable to fund the purchase on that date.

On January 2, 1979, at a hearing called for the purpose of confirming Respondent's Plan of Reorganization for the Aldersgate estate, Respondent reported *ex parte* to the Bankruptcy Judge that Petitioner had failed to close on December 31, 1978, and requested an order of forfeiture

of the $500,000 earnest money deposit. Petitioner was not present at that hearing and no notice was given to Petitioner that the subject of forfeiture would be raised at the January 2, 1979, hearing. On January 12, 1979, the Bankruptcy Court entered its order *sua sponte*, forfeiting Petitioner's deposit.

On January 26, 1979, Petitioner moved to vacate the January 12, 1979 Order pursuant to Fed. R. Civ. P. 60(b), on the ground that the order was void and on the further ground that Respondent could not perform the contract on his part. The motion was denied by the Bankruptcy Judge on June 1, 1979. (Appendix E). The District Court, on August 14, 1980, affirmed the orders of the Bankruptcy Judge. (Appendix C). Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the

District Court in its decision dated September 4, 1981 (Appendix A), and denied a petition for rehearing of this order on October 15, 1981. (Appendix B). This petition followed the order of October 15, 1981.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AS WELL AS APPLICABLE DECISIONS OF THIS COURT REGARDING THE RIGHT TO NOTICE AND HEARING.

ARGUMENT

The Fifth Circuit Court of Appeals' decision below (Appendix A) is in conflict with the decisions of this Court, as well as those of other courts of appeals. Decisions by these courts have recognized that the constitutional rights to notice and to an opportunity to be heard on the issue of liability apply in an action for forfeiture or monetary damages upon an alleged breach of contract.

This Court has on several occasions recognized that notice reasonably calculated to apprise a person of the pendency of forfeiture proceedings, and the related opportunity to present objections to a possible monetary forfeiture, are elementary and fundamental requirements of due process. *Robinson v. Hanrahan*, 409 U.S. 38 (1972). This is so whether the forefeiture proceeding is instituted pursuant to statute, *id.*, or whether forfeiture is ordered by a court *sua sponte* upon the breach of a contract or the failure to comply with a court order. Petitioner has been denied these fundamental due process rights in the instant case.

In *Bank of Marin v. England*, 385 U.S. 81 (1966), this Court recognized that the requirement of notice before a person is deprived of property applies in proceedings under the Bankruptcy Act. *Id.*, at 102. The Fifth Circuit in the case

sub judice sanctioned a departure by the Bankruptcy Court from the accepted and usual course of judicial proceedings, and in doing so, denied Petitioner its rights to notice and hearing contrary to the decisions of this Court and courts of appeals.

In *Fuentes v. Shevin*, 407 U.S. 67 (1971), this Court upheld a defaulting purchaser's rights to prior notice and hearing, even though the purchaser lacked full title to the chattels purchased under a conditional sales agreement and the right to continued possession was a matter in dispute. The holding of *Fuentes* is pertinent in the instant case:

> If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the

> hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual rights to continued possession and use of the goods.

407 U.S. at 87.

Both the Florida and Federal courts have repeatedly held that the purchaser at a judicial sale may not be ordered to pay the difference between his bid and the proceeds on resale, where there has been no notice that he would be held liable for the deficiency. *In re Huguenot Publishing Co., Inc.*, 83 F.2d 258 (2d Cir. 1936); *In re Rival Knitting Co., Inc.*, 289 F. 960 (2d Cir. 1923). While the purchaser may be held liable for any deficiency, he must be "given the full opportunity which enables him to meet the

issues as to his liability." 289 F. at 963. Nor will forfeiture of a property interest be permitted without notice and a chance to comply. *Dade County v. City of North Miami Beach*, 69 So. 2d 781 (Fla. 1954). A defaulting purchaser is entitled to no less protection upon the forfeiture of his earnest money deposit.

It has long been the law in Florida that where a land sale contract provides for forfeiture at the option of the vendor upon a default in payments, and the vendor wishes to exercise the option, he must give reasonable notice to the vendee of his intentions. *Realty Securities Corp. v. Johnson*, 93 Fla. 46, 111 So. 532 (1927). *Realty Securities Corp.* involved the forfeiture of installments paid under a contract for deed. Citing general authorities of common law, the court stated:

> While it has been held that no notice of forfeiture or termination of the

> contract is necessary where the contract expressly so provides, or declares in unequivocal terms that failure to make payments at the time agreed shall ipso facto work a forfeiture of the contract. . . . . it is generally held that when by the terms of the contract the vendor is merely given the option to forfeit, terminate, or rescind the contract on default of the purchaser in performance, notice of such intent must be given to the purchaser before the vendor can actually forfeit and terminate the contract.

111 So. at 534. Because the contract provided that on the purchaser's default, the payments made would be forfeited *at the option of the seller*, the seller was required to give notice to the purchaser of its intent to exercise the option.

The contract in this case, like that involved in *Realty Securities Corp.*, provided Respondent with an option upon the default of the purchaser. Respondent had the option of retaining the earnest money deposit, or in the alternative, proceeding to enforce his legal or equitable rights.

It is apparent from the above cited authorities that a defaulting purchaser's right to notice and opportunity to meet the issues as to his liability is a condition precedent to being held liable and forfeiting an earnest money deposit as damages for that liability. The fact that Petitioner was ordered by the Bankruptcy Court to complete the terms of the contract cannot eliminate the requirements of due process. Whether forfeiture is intended as a sanction for disobedience of a court order or as damages for breach of contract, matters presented at a hearing and offered in explanation or mitigation may lessen the judgment or avoid punishment altogether. *Groppi v. Leslie*, 404 U.S. 496, 502-03 (1972). Without an opportunity to be heard, any so-called notice of the impending forfeiture is rendered nugatory.

As a further condition precedent to forfeiture, the courts require proof

of default by the purchaser and of compliance by the seller. A vendee's refusal to pay or inability to strictly perform his own covenants when the vendor will not or cannot perform does not constitute a default by the vendee. *Sun City Holding Co. v. Schonfeld*, 97 Fla. 777, 122 So. 252, 254 (1929). It is firmly established in Florida that in order to successfully invoke a forfeiture provision in a contract for the sale and purchase of real estate, the party seeking the forfeiture must first prove strict compliance with those provisions of the contract required to be complied with by the party seeking the forfeiture; there must also be proof that the party against whom the forfeiture is sought has defaulted under the terms of the contract and that such default was neither excused nor caused by the party seeking to invoke the forfeiture provision. *Pickard v. Burroughs*, 304 So. 2d 455 (Fla. 1st DCA 1974); *Reider*

v. P-48, Inc., 362 So. 2d 105, 110 (Fla. 1st DCA 1978); *Guerrera v. Eldred Construction Corporation*, 378 So. 2d 327 (Fla. 4th DCA 1980). Such proof cannot be demonstrated unless there is a hearing on the matter.

The same requirement has been affirmed by this Court. In *Fuentes v. Shevin*, 407 U.S. 67 (1971), this Court noted that prior to replevin "the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments." *Id.*, at 87, n.17.

It is undisputed that the January 12th order of forfeiture was entered *sua sponte* without any proof of contract compliance being submitted by Respondent as required by *Fuentes* and applicable Florida law, and without giving Petitioner an opportunity to defend. The order of the Bankruptcy Judge, dated October 6, 1978, provides in part as follows (Appendix I):

> Friendly is directed to execute the contract for sale and purchase covering the Kissimmee property in the form previously tendered by the Trustee, with the deletion of only that provision which requires Friendly to deliver an irrevocable letter of credit or letter of commitment within forty-five calendar days from September 13, 1978. *If Friendly has not executed this Contract for Sale and Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit.*

(Emphasis supplied.) The threat of "automatic" forfeiture is the assessment of a penalty for disobedience of the order. The penalty was $500,000.

If the court's order of forfeiture was a punitive measure, the order could not be invoked without providing an opportunity to defend, just as the court would be obliged to hold a hearing in order to exercise its contempt power for disobedience of the court's command. *Fernos-Lopez v. United States District Court for the District of Puerto Rico*, 599 F.2d 1087 (1st Cir. 1979).

In numerous other contempt situations, the federal courts have steadfastly adhered to the basic requirements of fundamental procedural due process. In *Schleper v. Ford Motor Company, Automotive Division*, 585 F.2d 1367 (8th Cir. 1978), the issue of contempt was raised at a hearing noticed and called on a motion to dismiss, just as the issue of forfeiture in the instant case was raised at a hearing called for the purpose of confirming Respondent's Plan of Reorganization. The attorney in *Schleper* charged with the contempt limited his remarks at the hearing solely to the issue of dismissal and did not defend when the judge made a finding of contempt at the end of the hearing. In reversing, the court of appeals held:

> In short, because of inadequate notice and no meaningful opportunity to be heard, Phillips was denied fundamental procedural due process. *See In re Weeks, supra,* 570 F.2d at 247; *United States v. Peterson, supra,* 456 F.2d at 1139.

585 F.2d at 1372.

Clearly, Petitioner was deprived of his due process rights when the court ordered the forfeiture at a hearing which had not been called for that purpose and at which Petitioner was not even present.

Even if the court's order could mandate a forfeiture without notice, it cannot be enforced when the threat of forfeiture is couched in vague and ambiguous terms. The court ordered forfeiture "if" Petitioner failed to execute the contract. Petitioner complied with this order, but the court nonetheless deemed Petitioner's $500,000 earnest money deposit as automatically forfeitable upon any subsequent breach. If this was the court's intention, it was not clearly stated in the court's order of October 6, 1978. Nor can the court's verbal admonishments to Petitioner during the various hearings in this matter satisfy the requirements of an unequivocal

command. The threat of forfeiture simply does not give clear notice that forfeiture proceedings will in fact be instituted. *Ricker v. United States*, 417 F. Supp. 133, 138 (D. Me. 1976). Furthermore, the forewarning of forfeiture does not extend the opportunity to challenge either the validity of the October 6th order threatening forfeiture in the event of a breach, or the propriety of the court's decision to forfeit. *Id.*

While the notice of a judicial order, the violation of which may give rise to a forfeiture, is such notice as would tell a reasonable person what he is required to do, this was not the situation in the instant case. In *ILA, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967), this Court in a contempt case warned of the abuses of punishing for the violation of a vague order:

> The judicial contempt power is a potent weapon. When it is founded

> upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. Because the decree of this District Court was not so framed, it cannot stand. And with it must fall the District Court's decision holding the union in contempt.

389 U.S. at 76.

Of course, a party may incur a legal duty by entering into a contract, and a court may, pursuant to that agreement, incorporate the terms of the party's obligation in its order; but to furnish support for the order of forfeiture, the order must set forth in specific detail an unequivocal command. *ILA, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 74 (1967); *H.K. Porter Co., Inc. v. National Friction Products Corp.*, 568 F.2d 24, 27 (7th Cir. 1977).

The Contract for the Purchase and Sale of the Kissimmee property provided in part (Appendix H):

> If the Buyer fails to perform any of the covenants of this Contract within the time specified the deposits held by Seller, together with interest accrued thereon, shall be retained by and for account of the Seller as consideration for the execution of this Contract and in full settlement of any claims for damages and all parties shall be relieved of all obligations under this Contract or the Seller, at its option, may proceed at law or in equity to enforce its legal rights under this Contract including but not limited to, the right to bring suit for specific performance.

The court's October 6, 1978 order did not incorporate this language into an operative command, since the order only mentioned forfeiture in reference to executing the contract. Moreover, the Respondent waived the provision in the contract that gave him the option to retain the deposit in full settlement of any claim for damages, by proceeding in law or equity to enforce his legal rights. At the hearing on Petitioner's Motion to Vacate the January 12th Order, Respondent proceeded in an attempt to prove that the Estate had suffered damages

for breach of the contract. However, despite any waiver of the option to forfeit, Respondent was still under a duty to prove strict compliance on his part with the terms of the contract, and Petitioner had the right to defend on the issue of its liability.

By denying Petitioner this right, the decision of the Fifth Circuit Court of Appeals comes into conflict with previous decisions of this Court and the other courts of appeals. In light of the fundamental importance of the question presented, it is respectfully submitted that this Court should exercise its discretion to review the decision of the Court of Appeals in the instant case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the opinions and orders of the United States Court of

Appeals for the Fifth Circuit entered in this proceeding on September 4, 1981 (Appendix A) and on October 15, 1981 (Appendix B), and of the United States District Court for the Middle District of Florida entered on August 14, 1980 (Appendix C), and January 12, 1979 (Appendix F).

Respectfully submitted,

For Johnie A. McLEOD

Johnie A. McLeod
Attorney for Petitioner

Ralph M. McDermid
Of Counsel

CERTIFICATE OF SERVICE

I, Johnie A. McLeod, hereby certify that on this 20th day of November, 1981, copies of the foregoing Petition for Writ of Certiorari were furnished by mail, correct postage prepaid, to Douglas B. Beattie, Esquire, 500 Pan

American Bank Building, Orlando, Florida 32801, Attorney for Respondent.

/s/ JOHNIE A. MCLEOD

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FRIENDLY RETIREMENT CENTER, INC.,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-5697

In the Matter of

ALDERSGATE FOUNDATION, INC.,

Debtor.

FRIENDLY RETIREMENT CENTER, INC.,

Plaintiff-Appellant,

v.

LEE JAY COLLING, Successor Trustee,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(September 4, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge.

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* District Judge for the Southern District of Alabama, sitting by designation.

THOMAS, District Judge:

On January 12, 1979, the Bankruptcy Judge entered an order sua sponte forfeiting a $500,000 earnest money deposit posted by Friendly Retirement Center, Inc., to Lee Jay Colling, Successor Trustee. This deposit was made pursuant to a proposed purchase of certain real property located in or near Kissimmee, Florida, in a bankrupt proceeding under Chapter 10 of the Bankruptcy Act. The property was an asset of Aldersgate Foundation, Inc. The District Court, on August 14, 1980, affirmed the orders of the Bankruptcy Judge. An appeal to this Court followed.

Aldersgate was organized in 1961 as a non-profit, religious and charitable organization incorporated under Florida law to provide worship services, housing and nursing care for the elderly. The facility was operated in Kissimmee, Florida, under the name of Aldersgate Retirement Center. On September 12, 1974, Aldersgate

filed its petition for reorganization under Chapter X of the Bankruptcy Act. In its order of September 27, 1974, the District Court approved the petition and on August 12, 1975, transferred the reorganization proceeding to the Honorable Alexander L. Paskay, Bankruptcy Judge. Frank W. Reed was appointed Trustee of the Chapter X proceeding on October 3, 1974, and Lee Jay Colling was approved as Attorney for the Trustee on October 4, 1974. Lee Jay Colling was appointed as Successor Trustee of Aldersgate on November 30, 1978, following the death of the Trustee, Frank W. Reed, on November 18, 1978.

On March 28, 1978, the Bankruptcy Court ordered the Trustee to solicit sealed bids for the purchase of Aldersgate Retirement Center located in Kissimmee, and/or all remaining assets of the debtor corporation. On July 25, 1978, five

bids were received and opened by the Court. An earnest money deposit of $50,000.00 was to be required of the purchaser.

Of the five bids, International Properties, Inc., represented by a Mr. Baskin, had submitted the top bid, $11,000,000.00. Friendly Retirement Center, Inc. (Friendly) was the fourth highest bidder for the Kissimmee property with a bid of $8,350,000.00.

The Court entered an order on August 9, 178, directing the Trustee to negotiate a contract with the highest bidder, International Properties, Inc. After this order was entered, Friendly submitted two amended bids, the latter being for $11,480,200 and an agreement to assume certain outstanding claims against the estate.

On August 15, 1978, the Court heard arguments from the Trustee and other interested parties concerning acceptance

of Friendly's second amended bid and Friendly's ability to fund the bid. The Court entered an order on August 24, 1978, directing Friendly to make an additional deposit of $450,000.00 with the Trustee within ten days, thereby bringing the total amount of the deposit to $500,000.00. In addition, the Court ordered Friendly to confirm its bid in writing to the Trustee's attorney and directed Friendly to negotiate a final contract for the purchase of the Kissimmee property by August 30, 1978. International Properties was authorized to submit a higher bid on or before August 30, 1978, but did not.

At a hearing on August 30, 1978, the Trustee reported that Friendly failed to comply with the Court's order of August 15, 1978, in every respect, including the failure to deposit the additional $450,000.00 and of its unwillingness

to furnish written evidence of its ability to fund the second amended bid. International Properties had furnished the Trustee with evidence that satisfied the Trustee that it could fund its previous bid of $11,000,000.00 cash. The Trustee objected to the acceptance of the second amended bid of Friendly and recommended to the Court that the bid of International Properties be accepted. The Court, after the hearing, entered an order on August 31, 1978, tentatively approving Friendly's second amended bid, but with the provision that Friendly had to deposit with the Trustee's attorney, a cashier's check in the amount of $450,000.00 on or before September 1, 1978. Friendly complied with that requirement. The Court further ordered that on or before September 9, 1978, Friendly provide "proof of its ability to perform its second proposed bid by submitting a written commitment

by an approved lending institution to fund the purchase price of $11,480,200.00 or by submitting an irrevocable letter of credit in the amount of $11,480,200.00, less any deposit made herein." In addition, the Court ordered that Friendly "submit to the Trustee an executed contract of purchase and sale in a form acceptable to the Trustee on or before September 9, 1978."

On September 5, 1978, Friendly filed a motion for reconsideration of the August 31, 1978, order asserting that the Court's requirement for an irrevocable letter of credit or written commitment for the purchase price was "unfair, prejudicial and capricious." Friendly offered in good faith to make an additional deposit of $650,000.00 making its total deposit $1,150,000.00. This offer was not accepted.

On September 8, 1978, Friendly reported to the Court on its offer to purchase

the Kissimmee property. Attached to the report was a loan commitment from the First Federal of Seminole in the amount of $8,500,000.00.

A hearing on Friendly's motion to reconsider filed September 5th, was held on September 12, 1978. The Court was informed that International Properties had withdrawn its bid to purchase the Kissimmee property. Counsel for Friendly stipulated and agreed that the $500,000.00 deposit would be forfeited if Friendly defaulted.

On September 13, 1978, the Court entered an order granting Friendly's motion for reconsideration. Specifically, the Court found that "in light of the fact that the estate no longer has an alternative bid and in light of the fact that a deposit actually made by Friendly to-wit: the sum of one-half million dollars is a sufficient earnest money deposit" reconsideration was warranted. As a result,

the order of August 31, 1978, was amended to provide that "the deposit heretofore made by Friendly is deemed to be and shall be forfeited in the event of a default." The Court further amended the order by treating Friendly's deposit as forfeited if Friendly did not file by September 18, 1978, a loan commitment which must be irrevocable for ninety days from September 13, 1978, and an irrevocable letter of credit within 45 days. The Court reiterated that Friendly proceed to closing and close the transaction on or before December 12, 1978, and further decreed that the Bankruptcy Court would not consider, under any circumstances, any extensions of time with regard to any deadlines set forth in the Order.

On September 25, 1978, Friendly filed a motion for rehearing of the September 13, 1978, order, requesting only that

the requirement of an irrevocable letter of credit from an approved lending institution in the full amount of the purchase price be deleted and that Friendly be given an additional 30 days within which to close the transaction. In its motion, Friendly admitted the order of September 13, 1978, provided for the forfeiture of the $500,000.00 deposit if it failed to close the transaction.

A hearing on the matter was held on October 4, 1978. At that hearing, the Bankruptcy Court was advised that Friendly had not executed the contract for purchase and sale of the Kissimmee property as the Court had previously ordered. The motion for rehearing was granted by order of the Bankruptcy Court dated October 6, 1978, and the September 13, 1978, order was amended in the following manner:

> "1. The requirement that Friendly deliver an irrevocable letter of credit or a letter of commitment by an approved

lending institution within forty-five calendar days from September 13, 1978, is hereby stricken.

2. Friendly is directed to execute the Contract for Sale and Purchase covering the Kissimmee property in the form previously tendered by the Trustee, with the deletion of only that provision which required Friendly to deliver an irrevocable letter of credit or letter of commitment within forty-five calendar days from September 13, 1978. If Friendly has not executed this Contract for Sale and Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been ordered by this Court to be treated as forfeitable earnest money deposit.

3. Friendly shall proceed to closing and close this transaction on or before December 12, 1978. The Court reiterates that portion of its prior Order which provided that the Court would not consider under any circumstances any extensions or requests for extension of time to close this transaction."

On October 4, 1978, Friendly executed the Contract for Sale and Purchase and delivered it to the Trustee. By the terms of the contract, the closing was set for December 12, 1978.

On December 5, 1978, at a hearing scheduled for other purposes, the Court was informed by Friendly's attorney that it was unable to close on December 12, 1978. Friendly requested an extension of the closing date until December 31, 1978. During the December 5, 1978, hearing the Court was further informed by the Trustee that the requisite majority of Kissimmee and Englewood creditors and priority creditors had voted favorably for the Trustee's plan of Reorganization, but the requisite majority of unsecured creditors had failed to accept the plan. The Court was also informed that the class of unsecured creditors was controlled by Mark Construction Company and the Brewers, who together, held approximately 55 percent of the dollar amount of all unsecured claims, but that pursuant to the Contract for Sale and Purchase, Friendly had agreed to satisfy the Mark

Construction and Brewers claims against the estate.

On December 12, 1978, the Trustee reported to the Court that the parties had agreed that the sale to Friendly be postponed until December 29, 1978. On December 18, 1978, the Trustee sent out a notice to all creditors and parties in interest advising that the closing date had been extended to December 29, 1978.

On December 28, 1978, the Trustee was advised by Friendly that it would be unable to close on December 29, 1978, for the reason it did not have the necessary funds to complete the purchase.

On January 2, 1979, at a hearing scheduled for the confirmation of the plan of reorganization, the Trustee reported that Friendly had failed to close on December 29, 1978. The Trustee requested an order declaring the $500,000 earnest money

deposit be forfeited in accordance with the Court's previous orders, but further requested that the execution of the order be suspended until January 30, 1979, in order to give Friendly additional time to raise the necessary funds to purchase the Kissimmee property.[1/]

On January 12, 1979, the Court entered an order declaring the $500,000 earnest money deposit to be forfeited as a result of Friendly's "failure to close on December 29, 1978, and failure to deliver

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1/ There is some conflict as to whether Friendly was represented at the January 2, 1979, hearing. Reverend Albert Thomas, President of Friendly, was not present at the hearing. Attorneys present were Lee Colling, Charles George, Gordon Arkin, Johnnie McLeod, Ralph McDermitt, Robert Roth and Jerome Bornstein. Although Friendly is presently, as was then, represented by Mr. McLeod, there is evidence in the record that on January 2, 1979, Mr. McLeod, Mr. McDermitt, and Mr. Roth were representing Brewers, rather than Friendly. An order entered by Judge Paskey of the Bankruptcy Court on April 19, 1979, confirms this fact.

releases, satisfactions of claims, and dismissals of appeals from Mark Construction Company and the Brewers, as provided for in . . . (the) contract." Execution of the order was suspended until January 30, 1979, in order "that the Trustee may attempt to renegotiate the terms of the purchase and sale of Aldersgate's Kissimmee property to Friendly Retirement Center, Inc. . . ."

On January 26, 1979, Friendly moved to vacate the order of January 12, 1979, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on the ground that the order was void and on the further ground that the successor Trustee, Mr. Colling, could not perform the contract on his part.[2/]

During the hearing on January 30, 1979, the Court was informed that Friendly was still unable to close and that no

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2/ This issue will be dealt with later in this opinion.

acceptable renegotiation of the sale had been reached. As a result, the $500,000 deposit was deemed to be forfeited pursuant to the terms of the January 12, 1979, order.

On February 13, 1979, a hearing was held for consideration of Friendly's motion to vacate the order of January 12, 1979. An order was entered on June 1, 1979, wherein the Bankruptcy Court addressed each of Friendly's objections and each alleged defense. This order of June 1, 1979, denied Friendly's motion to vacate and held that the "Court's Order of January 12, 1979, where (the) Court ordered a forfeiture of Friendly Retirement Center, Inc.'s $500,000 earnest money deposit, due to Friendly's failure to close the sale of Aldersgate's Kissimmee property, remain in full force and effect."

An appeal to the District Court followed in which Friendly sought review of the

January 12, 1979, order denying the motion to vacate. The District Court affirmed the Bankruptcy Court's orders of January 12, 1979, and June 1, 1979, and dismissed Friendly's appeal by a Judgment entered August 14, 1980. It is this Judgment of the District Court from which Friendly now appeals.

The main questions presented in this appeal can be summarized as follows:

1. Whether there was a failure to give notice prior to the entry of forfeiture which resulted in denial of due process; and

2. Whether the forfeiture should be enforced if the Trustee could not perform the Contract for Sale and Purchase. Friendly contends denial of due process renders the forfeiture void, and that in any event, the Trustee's inability to perform his part of the Contract should relieve it of any forfeiture.

It is undisputed that the forfeiture was entered by the Bankruptcy Court sua sponte on January 12, 1979, with its execution suspended until January 30, 1979. The Bankruptcy Court based the forfeiture on Friendly's failure to close December 29, 1978, and on its failure to settle claims of certain unsecured creditors as it had agreed to do. Friendly contends that this order was given without prior notice and opportunity to be heard and thus, was a deprivation of property without due process. This Court finds this contention to be without merit.

The record contains numerous references to forfeiture of the earnest money deposit and to the conditions which would result in the forfeiture. As early as the hearing of September 12, 1978, all parties involved were aware and agreed that forfeiture would result if within a specified time period the sale was not closed or if

Friendly failed to show an irrevocable line of credit or full commitment for the full amount of money.[3/]

3/ The transcript of the September 12, 1978, hearing contains the following:

"Mr. Arkin: (An attorney for Com Bank, a secured creditor) I am convinced we're not in a position to crystal ball whether or not we're going to have a closing a hundred and twenty days from now. What I would like to suggest is that Mr. McLeod, if he will agree to it, agrees to sign a contract that the half million will be forfeited on default.

Judge: Definitely! This is a must.

Mr. Arkin: That default will be defined to include the failure to deliver an extension of the Seminole loan commitment within five days after its expiration of September 15. His failure to file an additional commitment within forty-five days closing the gap on financing, and if he can do those things, then we'll just wait until it closes in 90 to 120 days, and we have a half million dollars as security to insure it.

Mr. McLeod: Yes sir, we can --

. . .

Judge: Mr. McLeod, are you willing to go with the conditions that he suggested?

Mr. McLeod: (Attorney for Brewers, an unsecured creditor and for Friendly

Friendly, in its motion to reconsider the Court's order of September 13, 1978,

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3/ (cont.)

Retirement Center, Inc.). No problems on that.

. . .

Mr. McLeod: Within five days, we will -- on this Seminole, we will within five days after September 15; therefore, by September 20, we'll get a letter from Seminole, showing this is renewed, and is still effective, and for eight and a half million dollars, and then we will --

Judge: And that will be it?

Mr. McLeod: And we'll proceed then, Judge to close it and all within the 90 days.

Judge: That was a forfeitable $500,000 deposit, forfeitable!!

Mr. McLeod: If we do not close it out within 90 days, or an additional 30 days, if we've got something that will satisfy the Court, that will show that we do have the money, and maybe just a question of one or three or five days. The order of August 24 gives 90 days to close it, unless the lending institution says, "we do need a few more days, because the question of the title on this thing could take 30 or 60 or 90 days, as you understand, as per the contract, and they give us an abstract

stated three conditions of default[4/], but at no time did it challenge failure to close as a condition of the default.

3/ (cont.)

and these sort of things, but we do want the 90 days, Judge, either to close it out or show an irrevocable line of credit, or full commitment for the full amount of money, satisfactory to the court, and if an additional 30 days is needed, all right. If not, the five hundred thousand dollars will be forfeited." (Emphasis added).

(Record Vol. V, pp. 528, 529, 532-533.)

4/ In its motion, Friendly admitted that the order provided for forfeiture of the $500,000 if appellant failed to:

"1. File with the court on or before September 18, 1978, (five days after the order) a loan commitment which shall be irrevocable for 90 days from the date of the order in the amount of $8,500,000; Friendly has complied with this provision of the court's order.

2. File within forty-five (45) days from the date of the order an irrevocable letter of credit valid for 90 days from the date of the order in an amount sufficient to pay the full purchase price;

3. . . . close the transaction within 90 days from the date of the order. . . ."

By the terms of the Contract, and by Court Order dated October 6, 1978, the closing was set for December 12, 1978. This closing date was extended until December 29, 1979, by agreement of the parties. Closing did not occur on the latter date nor had it occurred when the Court entered its order of January 12, 1979, declaring a forfeiture of the earnest money deposit. At no time prior to the order of forfeiture did Friendly object to forfeiture on the basis of failure to close. The Bankruptcy Court delayed entry until January 30, 1979, in an attempt to allow for closing prior to an actual forfeiture. Had Friendly been capable of closing, it is evident that no forfeiture would have resulted. Friendly, therefore, had ample notice that forfeiture would occur if it did not close within the specified time period and if for any reason, the closing did

not occur through no fault of Friendly, it was justified in notifying the Court of the problem so that the forfeiture would not take effect.

Friendly relies on the fact that it was not represented at a January 2, 1979, hearing at which time the Court was informed of Friendly's failure to close and was requested to enter an order of forfeiture. Both the Bankruptcy Court and the District Court found that counsel for the Appellant, Johnnie McLeod, was present at the hearing. The fact that Mr. McLeod was present at the hearing is not disputed. What is disputed is whether McLeod represented Friendly at the hearing. Friendly contends that McLeod was representing an unsecured creditor and was not appearing on its behalf. The District Court noted that McLeod was Friendly's attorney of record at all relevant stages of the proceeding and continuedto represent Friendly on

appeal, as he now does. The Court further noted that McLeod did not object to the forfeiture, nor did he assert any defense. McLeod contends that he was not prepared to argue a defense against forfeiture for Friendly at the time of the hearing which was set for a different matter. This Court accepts the explanation of McLeod for not defending against the forfeiture at the time, but finds that McLeod would have been justified in requesting a hearing on the forfeiture instead of remaining silent as to the matter. The Court notes that objection to the proposed entry of default did not occur until after the Trustee notified Friendly by letter of his request for forfeiture.

This Court finds that the presence or absence of Friendly or its counsel from the January 2, 1979, hearing insignificant. The Court could have at any

time entered the order declaring a forfeiture of the deposit. Friendly, as stated previously, had ample notice that forfeiture would occur if closing was not completed by December 29, 1978. Friendly was given a reprieve from the forfeiture until January 30, 1979, but remained incapable of proceeding to closing. Friendly failed to meet the conditions which would have relieved it of the forfeiture. This Court, therefore, finds that there was no denial of due process in the entry of forfeiture made by the Bankruptcy Court.

Friendly further contends that forfeiture should not have been entered since the Trustee was also unable to perform. Unquestionably, Friendly was unable to receive adequate financing. It was not until after entry of forfeiture that Friendly contended that the Trustee was unable to perform.

Appellant contends that the Plan for Reorganization was never approved, that the title was never cured of defects and that the Trustee could not deliver a 226 bed hospital as stated in the Contract. Each of these contentions was addressed by the Bankruptcy Court in its order of June 1, 1979, and was rejected. The District Court affirmed the Bankruptcy Court's rejection. This Court finds that the Bankruptcy Court was correct in its reasoning. The Plan for Reorganization had been approved by the secured creditors but rejected by the unsecured creditors. From reviewing the record, it appears that a majority of the unsecured creditors would have approved the plan if Friendly had settled the claims with two unsecured creditors as it had agreed to do. Friendly's failure to comply with its agreement cannot now be used to construct a defense against forfeiture.

There is also evidence in the record that the claimed defect in title, the assignment of future fees to be received, is not a lien and is not a defect. In addition, Friendly failed to timely object to this "defect." The record also reflects that the Contract was for a 226 bed facility but was to be taken "as is", which was 170 licensed beds. The record also reflects that Friendly was aware that the facility was licensed for only 170 beds.

This Court finds that any inability to perform the contract by the Trustee was directly caused by Friendly. This Court, therfore, does not find any justification in relieving Friendly of the order of forfeiture.

The law in Florida is well settled that a purchaser in default cannot recover from the seller an earnest money deposit paid in part performance of an executory contract. Ruckelhaus v.

Broward Co. School Board, 494 F.2d 1165 (5th Cir. 1974); Williams v. Crouch, 186 So.2d 491 (Fla. 1966); Goldfarb v. Robertson, 82 So.2d 504 (Fla. 1955); Beatty v. Flannery, 49 So.2d 81 (Fla. 1950); Pico Development Corporation v. Edwards, 367 So.2d 698 (Fla. 4th D.C.A.); C D Condominiums, Inc. v. Dickinson, 301 So.2d 106 (Fla. D.C.A. 1974). This rule permitting forfeiture is not absolute but subject to the exceptions recognized in Beatty, supra. These exceptions are intimation of fraud on the part of the vendor; facts suggesting mutual recission; and failure of the purchaser to fulfill the contract due to matter beyond his control giving the vendor a benefit, the retention of which is shocking to the conscience of the court. 49 So.2d at 82.

This Court is in agreement with the District Court that the facts of this

case do not support the imposition of any of the exceptions to the general rule. Fraud has not been alleged. Mutual recission is not at issue. The $500,000 deposit reprsents 4.4 percent of the contract price and its retention is not "shocking to the conscience of the court" so as to warrant reversal. See, Ruckelhaus, supra; Beatty, supra; Cf. Hook v. Bomar, 320 F.2d 536 (5th Cir. 1968).

We find no error in the Judgment of the District Court and we, therefore, AFFIRM the Judgment of the District Court which affirmed the entry of forfeiture by the Bankruptcy Court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5697

IN THE MATTER OF: ALDERSGATE FOUNDATION, INC.

FRIENDLY RETIREMENT CENTER, INC.,
Plaintiff-Appellant,

versus

LEE JAY COLLING, Trustee,
Defendant-Appellee.

Appeal from the United States
District Court for the Middle
District of Florida

ON PETITION FOR REHEARING

(Oct. 15, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges; and THOMAS, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled

and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX C
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN THE MATTER OF:

ALDERSGATE FOUNDATION, INC.,

_____/

FRIENDLY RETIREMENT CENTER, Inc.,

Appellant,

vs. Case No. 79-520-Orl-Civ-Y
79-521-Orl-Civ-Y
and
79-522-Orl-Civ-Y

LEE JAY COLLING,
Successor Trustee,

Appellee.

_____/

J U D G M E N T

In accordance with the Memorandum Opinion entered simultaneously herewith, it is

ORDERED AND ADJUDGED that the orders of the Bankruptcy Judge of January 12, 1979, March 13, 1979, and June 1, 1979 be and are hereby affirmed and the appeals therefrom are dismissed.

SO ORDERED in Chambers at Orlando, Florida, this 14th day of August, 1980.

/s/ George C. Young
CHIEF JUDGE

Copies to:

Honorable Alexander Paskay

Johnie A. McLeod, Esquire
P. O. Drawer 950
38 East Main Street
Apopka, Florida 32703

Douglas Beattie, Esquire
500 Pan American Building
Orlando, Florida 32801

APPENDIX D
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN THE MATTER OF:

ALDERSGATE FOUNDATION, INC.,

_____/

FRIENDLY RETIREMENT CENTER, INC.,

Appellant,

vs. Case No. 79-520-Orl-Civ-Y
79-521-Orl-Civ-Y
LEE JAY COLLING, 79-522-Orl-Civ-Y
Successor Trustee,

Appellee.

_____/

MEMORANDUM OPINION

This cause is before the Court on the consolidated appeals of Friendly Retirement Center, Inc. from the following orders of the Bankruptcy Court in Case No. 74-383-Orl-Bkpt-P:

1) January 12, 1979 order which forfeited to the Trustee Friendly's earnest money deposit of $500,000.00 upon a finding by the Bankruptcy Court that Friendly

was in default on an agreement between the Trustee and Friendly for the purchase and sale of Aldersgate's Kissimmee property;

2) March 13, 1979 order which denied Friendly's motion to strike the Trustee's cross-designation of the record on appeal from the January 12th order; and

3) June 1, 1979 order which denied Friendly's motion for an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure relieving it from the January 12th order.

In support of its appeal from the March 13, 1979 order, Friendly contends that the record on appeal should not include any documents that were not before the Bankruptcy Judge prior to his ruling of January 12, 1979. However, Friendly also seeks, in this consolidated appeal, review of the June 1, 1979 order denying its motion for reconsideration. The documents that Friendly objects to being

made a part of the record on appeal of the June 12th order were certainly before the Bankruptcy Judge prior to his ruling on June 1st. Thus, by its own act of appealing the June 1st order, Friendly has rendered moot any objection it might have with respect to the appropriate record on appeal for review of the January 12, 1979 order in which forfeiture was declared. The issues presented by the remaining appeals may be summarized as follows:

1) Whether the order of the Bankruptcy Court declaring a forfeiture of the $500,000.00 earnest money security deposit was entered without notice to Friendly and without evidence that the Trustee had complied with the provisions of the contract; and

2) Whether the order declaring a forfeiture was unconscionable.

FACTS

On July 25, 1978 all sealed cash bids for the purchase of real and personal property owned by Aldersgate Foundation, Inc., and located in Englewood and Kissimmee, Florida, were delivered to the Bankruptcy Court for opening at a hearing held on that date. Appellant was the fourth highest bidder on the Kissimmee property. Subsequent to the hearing, the Bankruptcy Court entered an order on August 9, 1978, directing the Trustee to negotiate a contract with the highest bidder, International Properties, Inc. After this order was entered Appellant submitted two amended bids, the latter being in excess of the previous high bid of International Properties.

On August 24, 1978, after a hearing during which appellant's second amended bid was submitted, the Bankruptcy Court modified its August 9, 1978 order by

tentatively approving appellant's second amended bid ($11,480,200 plus the assumption of several outstanding claims against the estate) and directed the Trustee to enter into negotiations with appellant in an attempt to agree upon a final contract for the purchase and sale of the Kissimmee property as soon as was possible. The conditions attached to the tentative approval were that appellant submit an additional earnest money deposit of $450,000 to the Trustee within ten (10) days, bringing the total deposit required to $500,000; that appellant confirm the second amended bid in writing to counsel for the Trustee; that appellant and the Trustee enter into negotiations for the final contract for sale in an attempt to reach agreement by August 30, 1978; and that International Properties, the previous high bidder, would be given the opportunity to submit a higher bid

if they desired no later than August 30, 1978. Finally, the August 24, 1978 order continued the hearing on August 15, 1978 to August 30, 1978.

At the hearing on August 30, 1978 the Bankruptcy Court was informed by the Trustee that Appellant had failed to comply with the Court's directive of August 15, 1978 in that Appellant had failed to submit the additional $450,000 deposit and that negotiations with appellant for a proposed contract had been completely unsuccessful. The Trustee also informed the Court of Appellant's unwillingness to furnish written evidence of its ability to fund the second amended bi . International Properties had furnished the Trustee with evidence that satisfied the Trustee that they could fund their previous bid of $11 million cash. For these reasons the Trustee objected to the acceptance of

Appellant's second amended bid and recommended to the Court that the previous bid of International Properties be accepted.

On the basis of these objections, an order was entered by the Bankruptcy Court on August 31, 1978, once again tentatively approving Appellant's bid under the following conditions: 1) that appellant deposit with the Trustee's attorney, no later than 5:00 P.M., September 1, 1978, cash or a cashier's check in the amount of $450,000, bringing the total amount of the earnest money deposit to $500,000; 2) that appellant submit to the Trustee, on or before September 9, 1978, proof of its ability to perform its proposed bid in the form of a written commitment from an approved lending institution to fund the full purchase price of $11,480,200 or by submitting an irrevocable letter of credit in the amount of $11,480,200 less the amount of the

earnest money deposit and that the letter must remain irrevocable for a period of at least 120 days; and 3) that appellant submit to the Trustee an extended contract of purchase and sale in the form acceptable to the Trustee on or before September 9, 1978. The order further provided that if appellant failed to meet these conditions that the previous bid of International Properties would be approved and the Trustee was authorized to enter into negotiations with International Properties in that event.

On September 5, 1978 appellant filed a motion for reconsideration of the August 31, 1978 order asserting that the court's requirement of an irrevocable letter of credit or written commitment for the purchase price was "unfair, prejudicial, and capricious." 1/ Appellant offered

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1/ This Court notes that although appellant contended the requirement to be "unfair,

in the place of the letter of credit or loan commitment, to submit an additional $650,000 deposit prior to October 2, 1978. A hearing on the motion was held on September 12, 1978. During the hearing considerable discussion was had concerning the nature of the $500,000 earnest money deposit. At pages 19-20, and 20-21 of the transcript the following colloquy is recorded:

1/ (cont.)

prejudicial, and capricious" after the hearing, during the hearing appellant made no such objection and in fact represented to the bankruptcy court that it could obtain such proof of ability to perform. On Page 24 of the transcript of the August 30, 1978 hearing counsel for appellant stated, "We will have the letter of commitment for the full amount within ten days, Judge." At page 25 of the same transcript, the following statement of counsel for appellant is recorded:

> "Judge, we'll put the half million as per your court order, and we'll get a letter of commitment for the full amount of the purchase price within ten days, Judge, from a lending institution approved by the trustee in this case."

"Mr. Arkin: I'm convinced we're not in a position to crystal ball whether or not we're going to have the closing a hundred and twenty days from now. What I would like to suggest is that Mr. McLeod, if he will agree to it, agrees to sign a contract that the half million will be forfeited on a default.

Judge: Definitely! That is a must.

Mr. Arkin: That the default will be defined to include the failure to deliver an extension of the Seminole County loan commitment within five days after its expiration on September 15. His failure to file an additional commitment within forty-five days closing the gap on financing, and if he can do those things, then we'll just wait until it closes in 90 or 120 days, and we have half a million dollars as security to insure it.

Mr. McLeod: Yes, sir, we can --

Mr. Roth: I would suggest to the Court that a half a million dollars is sufficient, and if in three months time -- and according to the reports the trustee files, it is grossing on the Kissimmee property nine thousand dollars a day in income.

Mr. Arkin: That's not what I'm worried about. What I'm worried about is getting an amended plan of reorganization which provides paper to the creditors and not cash. We're entitled to know whether that is going to happen, as fast as possible, so maybe we can take some steps to avoid it happening.

Mr. Roth: The point I'm making is that I would submit is that a five hundred thousand good faith forfeitable deposit is sufficient to protect the estate against any damages it might have.

Judge: Mr. McLeod, are you willing to go with the conditions that he suggested?

Mr. McLeod: No problems on that.

. . .

Mr. McLeod: Within five days, we will -- on this Seminole, we will within five days after September 15; therefore, by September 20, we'll get a letter from Seminole, showing this is renewed, and is still effective, and for eight and a half million dollars, and then we will ---

Judge: And that will be it?

Mr. McLeod: And we'll proceed then, Judge, to close it and all within the 90 days.

Judge: That was a forfeitable $500,000 deposit, forfeitable!!

Mr. McLeod: If we do not close it out within 90 days, or an additional 30 days, if we've got something that will satisfy the court, that will show that we do have the money, and maybe just a question of one or three or five days. The order of August 24 gives 90 days to close it, unless the lending institution says, "we do need a few more days, because the question of the title on this thing

> could take 30 or 60 or 90 days, you understand, as per the contract, and they give us an abstract and these sort of things, but we do want the 90 days, Judge, either close it out or show an irrevocable line of credit, or full commitment for the full amount of money, satisfactory to the court, and if an additional 30 days is needed, all right. If not, the five hundred thousand dollars will be forfeited."

Additionally, during the hearing the court was informed that International Properties was withdrawing its previous bid.

On September 13, 1978 the Bankruptcy Court entered an order granting appellant's motion for rehearing. Specifically, the court found that "in light of the fact that the estate no longer has an alternative bid and in light of the fact that a deposit actually made by Friendly to wit the sum of one-half million dollars is a sufficient earnest money deposit" reconsideration was warranted. As a result, the August 31, 1978 order was amended in the following respects:

"First, the deposit heretofore made by Friendly is deemed to be and is treated as a forfeitable earnest money deposit and shall be forfeited in the event of a default; which default occurs if Friendly is unable to meet the remaining terms and conditions of the purchase which are as follows:

1) Friendly shall file with the court, along with a copy to the trustee, on or before September 18, 1978 5:00 P.M., an effective loan commitment which shall remain valid and outstanding and irrevocable for ninety net calendar days from the date of the entry of this order in the amount not less than the amount of a previous loan commitment filed in this proceeding by First Federal of Seminole.

2) Within forty-five net calendar days from the date of the entry of this order, Friendly shall file an irrevocable letter of credit valid for not less than ninety net calendar days from this date in the amount, sufficient to pay in full the entire purchase price approved by the court upon closing or in the alternative, a letter of commitment from an approved lending institution in the same amount and valid and enforceable for the same period of time as provided by the letter of credit mentioned above. Miscellaneous letters of recommendation like the ones heretofore submitted by Friendly, are not acceptable and will not satisfy the requirements imposed by this Order.

> Lastly, Friendly shall proceed to closing and close the transaction on or before the expiration of the ninety net calendar days from the date of the entry of this Order. It is further
>
> ORDERED, ADJUDGED AND DECREED that the court will not consider under any circumstances any extensions or request for enlargement of time with regard to any of the dates specified herein."

On September 25, 1978 appellant filed a motion for rehearing of the September 13, 1978 order, requesting deletion of the requirement of an irrevocable letter of credit from an approved lending institution in the full amount of the purchase price and requesting that appellant be given an additional 30 days within which to close. 2/ The motion for rehearing

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2/ In its motion, appellant admitted that the order of September 13, 1978 provided for the forfeiture of the $500,000 deposit if appellant failed to:

> "1. File with the court on or before September 18, 1978 (five days after the order) a loan commitment which shall be irrevocable for 90 days

was granted by order of the Bankruptcy Court entered on October 6, 1978 and the Septemer 13, 1978 order was amended in the following manner:

"1. The requirement that Friendly deliver an irrevocable letter of credit or a letter of commitment by an approved lending institution within forty-five calendar days from September 13, 1978 is hereby stricken.

2/ (cont.)

from the date of the order in the amount of $8,500,000; Friendly has complied with this provision of the court's order.

2. File within forty-five (45) days from the date of the order an irrevocable letter of credit valid for 90 days from the date of the order in an amount sufficient to pay the full purchase price;

3) . . .close the transaction within 90 days from the date of the order. . . ."

Appellant did not contend, as it does now, that failure to close would not result in forfeiture, nor did it seek relief from that portion of the September 13, 1978 order which declared that failure to close would result in forfeiture.

2. Friendly is directed to execute the Contract for Sale and Purchase covering the Kissimmee property in the form previously tendered by the Trustee, with the deletion of only that provision which required Friendly to deliver an irrevocable letter of credit or letter of commitment within forty-five calendar days from September 13, 1978. If Friendly has not executed this Contract for Sale and Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been ordered by this Court to be treated as a forfeitable earnest money deposit.

3. Friendly shall proceed to closing and close this transaction on or before December 12, 1978. The court reiterates that portion of its prior Order which provided that the court would not consider under any circumstances any extensions or requests for extensions of the time to close this transaction." 3/

The Record reveals that on October 4, 1978 the Contract for Sale and Purchase

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3/ At no place in the Order of October 6, 1978 did the Bankruptcy court amend its prior ruling that failure to close within the time specified would result in forfeiture of the deposit.

was executed by appellant and delivered to the Trustee. By the terms of the contract, the closing was set for December 12, 1978.

On December 5, 1978, at a hearing scheduled for other purposes, the Bankruptcy court was informed by appellant's attorney that it was unable to close by December 12, 1978. Appellant requested an extension of the closing date to December 31, 1978. On December 18, 1978, pursuant to an order of the Bankruptcy court, the Trustee sent out a notice to all creditors and parties in interest extending the closing date for the sale of the Kissimmee property to December 29, 1978.

Appellant was unable to close on December 29, 1978 for the reason that it was unable to come up with sufficient funds to purchase the Kissimmee property. The Bankruptcy Court was informed of Appellant's

failure to close at a hearing on January 2, 1979, which was originally scheduled for consideration of the balloting concerning the Trustee's Plan of Reorganization. Counsel for appellant was present at the January 2, 1979 hearing. 4/ After informing the Court of appellant's failure to close, the Trustee requested that the Court enter an order declaring that the $500,000 earnest money deposit be forfeited. The Trustee was directed by the court to prepare and submit a

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4/ One of the issues raised by appellant in this appeal is that it was denied due process in the proceedings below because appellant was not present in person or by counsel at the January 2, 1979 hearing when the declaration of forfeiture was made. The fact remains, however, that Johnnie McLeod was attorney for appellant and McLeod was present at the hearing, notwithstanding his contention that he appeared solely on behalf of the Brewers.

proposed order declaring the deposit to be forfeited. No objections were made to this directive of the Court. On January 12, 1979 an order was entered declaring the $500,000 earnest money deposit to be forfeited as a result of appellant's "failure to close on December 29, 1978, and failure to deliver releases, satisfactions of claims, and dismissals of appeals from Mark Construction Company and the Brewers, as provided for in ... [the] contract." Execution of the order was suspended until January 30, 1979 in order to permit appellant to come up with sufficient funds to close the sale.

A hearing was held on January 30, 1979 concerning confirmation of the Trustee's Plan and for report on appellant's ability to raise the funds needed to close. During this hearing the Bankruptcy Court was informed that appellant was

still unable to close and that no acceptable renegotiation of the sale had been received by the Trustee. As a result, the $500,000 deposit was forfeited pursuant to the terms of the January 12, 1979 order.

On January 26, 1979 appellant filed a motion to vacate the January 12, 1979 order, seeking relief from the declaration of forfeiture. Appellant alleged in support of the motion that the order was enteredwithout notice to appellant. Appellant further contended that had it been given notice it would have asserted numerous defenses to entry of forfeiture. Each of the defenses was set forth in the motion. On February 13, 1979 a hearing was held for consideration of the motion to vacate. Subsequent to the hearing, an order was entered on June 1, 1979 wherein the Bankruptcy Court considered appellant's objection and each alleged defense. The June 1, 1979 order denied

appellant's motion to vacate. The current appeals followed in which appellant seeks review of the January 12, 1979 order declaring forfeiture and the June 1, 1979 order denying the motion to vacate.

The issues raised in the present appeals are:

1) whether the order of the Bankruptcy court, entered January 12, 1979, and which declared a forfeiture of the $500,000 earnest money security deposit, was entered without notice to appellant and without evidence that the Trustee had complied with the provisions of the contract; and

2) whether the order declaring a forfeiture was unconscionable.

I.

Appellant contends that the order of the Bankruptcy court dated January 12, 1979, was entered without prior notice and opportunity to be heard and, as a

result, is ineffective and void. Furthermore, appellant contends that it was not present in person or by counsel at the hearing held on January 2, 1979, during which the Bankruptcy court was notified of appellant's failure to close, that it was not notified of the hearing, and that as a result thereof, it was denied the opportunity to present certain "meritorious" defenses that it had available to entry of default.

Contrary to appellant's allegations, the record is replete with evidence that appellant had more than sufficient notice that failure to close would result in forfeiture. Several hearings were held on the conditions of the acceptance of appellant's second amended bid. Whereas the original deposit required of the successful bidder was $50,000, upon considering the Trustee's reservations concerning appellant's ability to fund its

bid, the Bankruptcy Court increased the deposit to $500,000. It is clear from reviewing the transcript of the September 1., 1979 hearing, cited above, that appellant understood, as one of the terms of acceptance of its bid, that failure to close would result in the forfeiture of the deposit. Furthermore, the order entered September 13, 1979, as a result of this hearing, plainly sets forth that failure to close would result in forfeiture. Appellant now contends that it did not understand one of the conditions of default to be failure to close, however, in its motion for reconsideration of the September 13, 1979 order appellant stated its understanding that failure to "close the transaction within 90 days from the date of the order" would result in forfeiture.

Although appellant filed motions for reconsideration to several orders of the Bankruptcy court, at no time did

appellant seek reconsideration of this issue. Similarly, appellant at no time argued this issue during any hearing held in consideration of its preclosing motions. Appellant made no objection to the provisions of the contract for Sale and Purchase which declared failure to close would result in forfeiture. A review of the record reveals that appellant had numberous opportunities to be heard prior to January 2, 1979 on the question of forfeiture had it objected to that condition of acceptance. In fact, even at the January 2, 1979 hearing, appellant had the opportunity to raise objection to the condition and the court's expression of its intent to enter forfeiture.

Appellant contends that it was not present in person or by counsel at the January 2, 1979 hearing. The record in this case reveals that counsel for

appellant, Johnie McLeod, was, in fact, present at the January 2, 1979 hearing. Appellant contends, however, that the hearing was called to consider another matter and that McLeod was representing another client for the purpose of the hearing. As a result, appellant contends it was not afforded an opportunity to be heard during the hearing in which it was deprived of a valuable property interest. Upon consideration, the court finds this contention to be wholly without merit.

McLeod was attorney of record for appellant during all relevant stages of the proceeding in Bankruptcy court, both before and after the January 2, 1979 hearing, and continues representation of appellant in the present proceedings. As attorney of record he may not turn on and off his representation of various clients in order to claim

that his client was denied an opportunity to be heard when such an argument appears convenient. He was present at the January 2, 1979 hearing during which the Bankruptcy court declared appellant to be in default for failure to close by December 29, 1978, and directed that a proposed order be drafted and submitted to the court forfeiting the $500,000 deposit. At no time during this proceeding did McLeod object to entry of forfeiture, nor did he assert any defense that appellant allegedly had available to said entry. On these facts the court finds that appellant was not denied an opportunity to be heard prior to entry of the January 12,1979 order.

In addition to the objection discussed above, appellant contends that the Bankruptcy court erred in declaring the forfeiture prior to a finding that the Trustee was able to perform its obligations under

the sale. At no time prior to entry of the January 12, 1979 order did appellant contend that the Trustee was unable to perform on the contract for sale. The record on appeal reveals that the sole factor precluding closing on the Kissimmee property was appellant's inability to come up with sufficient funds. Appellant was given several extensions of time within which to acquire necessary funding. Although appellant was legally in default after December 29, 1978, the January 12, 1979 order suspended execution of the forfeiture until January 30, 1979, in order to give appellant additional time in which to come up with the purchase price agreed to in the contract for sale. Appellant was unable to do so.

Appellant raised numerous "meritorious" defenses to entry of forfeiture in its motion to vacate the January 12, 1979

order. After hearing on the matter, the Bankruptcy court entered an order in which each of the defenses were considered in detail and rejected. This court has reviewed the consideration given to each and concludes that the Bankruptcy Court was correct in denying the motion to vacate for the reasons set forth more clearly in the June 1, 1979 order.

II.

The second issue raised in these appeals is whether the order declaring forfeiture was unconscionable. Appellant's second amended bid, which was accepted and incorporated in the contract for sale, was in the amount of $11,480,200, plus the settlement of several outstanding claims against the estate. The $500,000 earnest money deposit represents approximately 4.4 percent of the total purchase price.

The law in Florida is well settled

that a purchaser in default cannot recover from the seller an earnest money deposit paid in part performance of an executory contract. Goldfarb v. Robertson, 82 So.2d 504, 506 (Fla. 1955); Beatty v. Flannery, 49 So.2d 81, 82 (Fla. 1950); Pico Development Corporation v. Edwards, 367 So.2d 698, 699 (Fla. D.C.A. 1979); Bruce Builders, Inc. v. Goodwin, 317 So.2d 868, 869 (Fla. 4th D.C.A. 1975); Delta Mobile Homes, Inc. v. Ehmann, 275 So.2d 269, 270 (Fla. 3d D.C.A. 1973). However, the rule permitting forfeiture is not absolute. In Beatty, supra, the Supreme Court of Florida recognized three exceptions to the general rule. These include intimation of fraud on the part of the vendor; facts suggesting mutual recission; and failure of the purchaser to fulfill the contract due to matters beyond his control giving the vendor a benefit, the retention of which is shocking to the conscience of the court.

49 So.2d at 82.

Upon consideration, the court concludes that the facts of this case do not support the imposition of any of the exceptions to the general rule. Fraud on the part of the Trustee has not been alleged by appellant. Nor is mutual recission at issue here, this court having previously determined that appellant's alleged defenses to entry of forfeiture are without merit. Finally, the court does not consider retention of the $500,000 deposit, representing approximately 4.4 percent of the purchase price, pursuant to the terms of the contract and orders of the Bankruptcy court so shocking to the conscience of the court to warrant reversal. See Ruckelhaus v. Broward County School Board, 494 F.2d 1164, 1166 (5th Cir. 1974) (forfeiture of deposit representing 12.3 percent of the contract price found reasonable); Beatty, supra, (forfeiture

of deposit representing 10 percent of the contract price found reasonable); O'Neill v. Broadview, Inc., 112 So.2d 280 (Fla. 2d D.C.A. 1959) (forfeiture of deposit representing 14 percent of the contract price found reasonable). Cf. Hook v. Bomar, 320 F.2d 536 (5th Cir. 1968) (forfeiture of deposit representing 32 percent of the contract price held unreasonable). Accordingly, the orders of the Bankruptcy Judge of January 12, 1979, March 13, 1979 and June 1, 1979 will be affirmed by separate judgment.

DONE in Chambers at Orlando, Florida, this 14th day of August, 1980.

/s/ George C. Young
CHIEF JUDGE

Copies to:
Honorable Alexander Paskay
Counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 74-383-ORL-BKPT-P

In The Matter Of:

ALDERSGATE FOUNDATION, Inc.,

Debtor.

_____/

ORDER DENYING FRIENDLY RETIREMENT CENTER, INC.'S MOTION TO VACATE THE ORDER OF JANUARY 12, 1979

THIS CAUSE, having come to be heard on the 13th day of February, 1979, at a hearing duly scheduled for the consideration of Friendly Retirement Center's Motion to Vacate this Court's Order of January 12, 1979, wherein the Court ordered a forfeiture of Friendly Retirement's $500,000 earnest money deposit, due to Friendly's default on the contract for purchase and sale of Aldersgate's Kissimmee property. At this hearing, this Court heard testimony and oral arguments

from the attorneys for Friendly Retirement Center, Inc., the Successor Trustee, ComBank/Winter Park, and other interested parties, and the pertinent facts are summarized as follows:

On March 28, 1978, this Court entered an Order directing the Trustee to solicit sealed bids for the purchase of Aldersgate's Kissimmee property and/or any remaining assets of the debtor. On April 3, 1978, the Trustee filed a motion for rehearing on the Bankruptcy Court's Order of March 28, 1978, directing the Trustee to solicit sealed bids. A hearing on the Trustee's motion for rehearing was held on April 25, 1978, and this Court entered an Order on April 26, 1978, denying the Trustee's motion for rehearing. Subsequent to April 26, 1978, the Trustee solicited sealed bids by advertising in the Wall Street Journal, the New York Times, the London Financial Times, in addition to

placing advertisements in newspapers in Orlando, Jacksonville, Tampa, and Miami, Florida and Montreal, Quebec.

On May 18, 1978, in response to a motion for rehearing filed by the Trustee, this Court entered an Order extending the deadline for submitting sealed bids concerning the purchase of any of the debtor's property until July 21, 1978. Said Order further directed that all sealed bids would be opened and the terms thereof announced by this Court at a hearing rescheduled for July 25, 1978. On July 25, 1978, in accordance with the bid procedure approved by this Court, the Trustee delivered to this Court for opening, all sealed cash bids for the purchase of Aldersgate's property, located in Englewood and Kissimmee, Florida. Pursuant to the hearing on July 25, 1978, this Court entered an Order, dated August 9, 1978, declaring that the following

five cash bids had been received for the Kissimmee property, to wit:

1. International Properties Group
$11,000,100

2. The Whichard Group, Inc.
$ 9,826,000

3. The Evangelical Lutheran Good Samaritan Society, Inc.
$ 9,000,000

4. Friendly Retirement Center, Inc.
$ 8,350,000

5. Kingswood, Inc.
$ 7,000,430

In its August 9, 1978 Order, this Court directed the Trustee to negotiate a contract with International Properties, Inc., the highest bidder, and submit said contract to the Court on or before August 15, 1978. Subsequent to the July 25, 1978 hearing, concerning the sealed bids, Friendly Retirement amended its sealed bid of $8,350,000. In addition to increasing its bid to $10,500,000 cash, Friendly agreed to settle all claims held by the Brewers, Mark Construction

Company and the Hansen Plan creditors. At the hearing held on August 15, 1978, Friendly Retirement Center, Inc., amended its bid for the second time to $11,480,200 cash, plus settlement of the above-mentioned claims.

On August 15, 1978, this Court heard argument from the Trustee and other interested parties concerning acceptance of Friendly's second amended bid and Friendly's ability to fund such a bid. This Court, finding it to be in the best interests of the Estate and the creditors to maximize the purchase price for the Kissimmee property, entered an Order dated August 24, 1978, directing Friendly to make an additional deposit of $450,000 to the Trustee within ten days, thereby bringing the total amount of the deposit to $500,000. In addition, this Court ordered Friendly to confirm their bid in writing to the attorney for the Trustee

and directed Friendly to negotiate a final contract by August 30, 1978. This August 24, 1978 Order also gave International Properties, the highest bidder during the sealed bid process, an opportunity to raise its bid over and above that of Friendly Retirement Center, Inc., on or before August 30, 1978. Said Order further directed that the August 15, 1978 hearing be continued until August 30, 1978.

At the hearing on August 30, 1978, the Trustee reported that Friendly Retirement had failed to comply with this Court's August 15, 1978 Order in every respect, including the failure to deposit the additional $450,000. On August 30, 1978, the Trustee objected to the acceptance of Friendly's second amended bid on the basis of Friendly's failure to evidence its ability to perform its proposed bid. As a result of this hearing, this Court

entered an Order dated August 31, 1978, tentatively approving Friendly Retirement's second amended bid with the provision, however, that Friendly Retirement must deposit with the Trustee's attorney, a cashier's check in the amount of $450,000 on or before September 1, 1978. This Court further ordered that on or before September 9, 1978, Friendly Retirement was to provide "proof of its ability to perform its proposed bid by submitting a written commitment by an approved lending institution to fund said purchase price of $11,480,200 or by submitting an irrevocable letter of credit in the amount of $11,480,200, less any amount of deposit made herein". In addition, this Court ordered that Friendly Retirement, "submit to the Trustee an executed contract of purchase and sale in a form acceptable to the Trustee on or before September 9, 1978".

Subsequent to the August 31, 1978 Order, Friendly Retirement filed a motion for rehearing and reconsideration, requesting relief from the provision requiring the furnishing of a letter of credit or a loan commitment. In its place, Friendly offered to make an additional $650,000 deposit to be paid on or before October 2, 1978. The Trustee filed a response in opposition to Friendly's motion and a hearing on the matter was held on September 12, 1978. At the hearing on September 12, 1978, a representative of International Properties informed the Court that they were withdrawing their bid to purchase Aldersgate's Kissimmee property. Therefore, this Court, noting that the Estate no longer had an alternative bid and that the $500,000 deposit was a sufficient earnest money deposit, entered an Order on September 13, 1978, granting Friendly Retirement's motion for rehearing and

amending this Court's August 31, 1978 Order. The Order of September 13, 1978 further provided that, "the deposit heretofore made by Friendly Retirement is deemed to be and is treated as a forfeitable earnest money deposit and shall be forfeited in the event of a default; which default occurs if Friendly is unable to meet the remaining terms and conditions of the purchase which are as follows;

"1. Friendly shall file with the Court, along with a copy to the Trustee, on or before September 18, 1978, 5:00 P.M., an effective loan commitment which shall remain valid and outstanding and irrevocable for ninety net calendar days from the date of the entry of this Order in the amount not less than the amount of the previous loan commitment filed in this proceeding by First Federal of Seminole.

2. Within forty-five net calendar

days from the date of the entry of this Order, Friendly shall file an irrevocable letter of credit valid for not less than ninety net calendar days from this date, in the amount, sufficient to pay the entire purchase price approved by the Court on closing, or in the alternative, a letter of commitment from an approved lending institution in the same amount and valid for the same period of time as provided by the letter of credit mentioned above. Miscellaneous letters of recommendation like the ones heretofore submitted by Friendly, are not acceptable and will not satisfy the requirements imposed by this Order.

Lastly, Friendly shall proceed to closing, and shall close the transaction on or before the expiration of ninety net calendar days from the date of the entry of this Order. It is further

ORDERED, ADJUDGED AND DECREED that the Court will not consider under any circumstances any extensions or requests for enlargement of time with regard to any of the dates specified herein".

Subsequent to the entry of the September 13, 1978 Order, Friendly Retirement filed a second motion for rehearing requesting deletion of the requirement of an irrevocable letter of credit from an approved lending institution in the full amount of the purchase price. The Trustee filed a response in opposition to Friendly Retirement's motion for rehearing and a hearing on the matter was held on October 4, 1978. At said hearing the Trustee informed the Court that Friendly had not executed a contract for purchase and sale of the Kissimmee property, as previously ordered. Pursuant to the October 4, 1978 hearing, this Court entered

an Order on October 6, 1978, striking the requirement of an irrevocable letter of credit, but directing Friendly to execute a contract in the form previously tendered by the Trustee, deleting only that provision requiring an irrevocable letter of credit. This Court further stated in its October 6, 1978 Order, that, "if Friendly has not executed this contract for sale and purchase and delivered it to the Trustee by 5:00 P.M., on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit made by Friendly, which deposit has been ordered by this Court to be treated as a forfeitable earnest money deposit". In addition, this Court directed that "Friendly shall proceed to closing, and close this transaction on or before December 12, 1978," and, that "the Court reiterates that portion of its prior Order which provided that the Court would not consider under

any circumstances any extensions or requests for extensions of the time to close this transaction". On October 4, 1978, Friendly executed the contract referred to above and subsequently delivered the same to the Trustee.

On December 5, 1978, at a hearing scheduled for consideration of the balloting concerning the Trustee's Plan of Reorganization, counsel for Friendly Retirement informed the Court that they would be unable to close on December 12, 1978, and requested an extension of the closing date until December 31, 1978. At a December 5, 1978 hearing, the Court was further informed by the Trustee that a requisite majority of Kissimmee and Englewood creditors and priority creditors had voted favorably for the Trustee's Plan, but a requisite majority of unsecured creditors had failed to accept said Plan. The Court was further

informed that the class of unsecured creditors was controlled by Mark Construction Company and the Brewers, who, together, held approximately 55% of the dollar amount of all unsecured claims. In addition, the Court was informed that Friendly Retirement had, pursuant to the contract of purchase and sale, agreed to settle Mark Construction's and the Brewers' claims at the closing of the sale of the Kissimmee property. Therefore, the Trustee agreed to, and this Court approved, a postponement of the Kissimmee closing, until December 29, 1978. In addition, this Court entered an Order extending the time in which to file ballots concerning the Trustee's Plan of Reorganization until December 31, 1978 and rescheduled the Confirmation hearing for January 2, 1979.

On December 28, 1978, the Trustee was advised by Friendly Retirement that they would be unable to close on

December 29, 1978, for the reason that they did not have the necessary funds to purchase the Kissimmee property. On January 2, 1979, at the rescheduled Confirmation hearing, the Trustee reported to this Court, in the presence of Friendly Retirement's legal counsel, that Friendly Retirement had failed to close on December 29, 1978. The Trustee requested that the Court enter an Order forfeiting the $500,000 cash deposit, in accordance with the Court's previous Orders of September 13 and October 6, 1978, but suspending execution of said forfeiture until January 30, 1979, in order to give Friendly additional time within which to raise the necessary funds to purchase the property. At the January 2, 1979 hearing, this Court, from the bench, i dicated that it would enter such an Order, and on January 12, 1979, entered a written Order on the forfeiture of

the earnest money deposit made by Friendly Retirement Center, Inc. At a hearing held on January 30, 1979, concerning confirmation of the Trustee's Plan, the Trustee reported to the Court that Friendly Retirement still was unable to close the sale of the Kissimmee property and that no acceptable renegotiation of the sale of said property had been received by the Trustee.

Friendly Retirement seeks relief from the forefeiture provision of the Order previously entered by this Court on January 12, 1979, on the following grounds:

It is the contention of Friendly Retirement that the Order was entered without notice and without an opportunity to be heard, and therefore, said Order is in violation of the due process requirement of the Constitution, and as such, is void.

Next, it is the contention of Friendly

Retirement that the Trustee himself breached the contract and was not in a position to perform the contract since he did not cure certain alleged defects in the title. In addition, Friendly alleges that the Trustee cannot perform a material provision of the contract; Friendly claims that the contract called for the deliverance of a 226-bed nursing home, which the Trustee could not deliver, since the nursing home was and still is licensed for only 170 beds.

Next, Friendly contends that the contract was not finalized and could not have been consummated until the Trustee's Plan of Reorganization was confirmed. In this connection, Friendly also urges that after the contract in question was signed by the Trustee and by Reverend Arthur Thomas, as the President of Friendly Retirement Center, Inc., there were modifications inserted by Reverend Thomas

which were never approved by the Trustee. Therefore, Friendly asserts that parties did not reach a final agreement. Friendly further contends that credits to be applied the purchase price for the settlement of the Mark Construction and Brewer claims have never been determined by the Court, and thus, the parties failed to reach a final agreement.

Lastly, Friendly asserts that the Trustee breached the terms of the contract by soliciting other purchasers for the Kissimmee property and by otherwise adversely affecting Friendly's ability to close the Kissimmee sale. Friendly further asserts that the Trustee failed to disclose the above-mentioned matters to this Court, although the Trustee had full knowledge thereof. Friendly therefore asserts that this Court was misled into entering the Order of Forfeiture of Friendly's deposit and said Order is void as a result

of the Trustee's failure to disclose the above-mentioned matters.

FRIENDLY RETIREMENT HAD FULL OPPORTUNITY TO BE HEARD AND DUE PROCESS OF THE LAW PRIOR TO ENTRY OF THE FORFEITURE ORDER

Friendly Retirement contends in its Motion to Vacate, that the January 12, 1979 Order of Forfeiture, was entered without notice to Friendly Retirement, and thus Friendly has been denied the due process of the law. Although it is true that the Order of January 12, 1979, was entered without an additional hearing, the record is clear that the September 13, and October 6, 1978 Orders, both of which dealt with the deposit and forfeiture, were entered after extensive hearings and argument by counsel. Both the September 13 and October 6 Orders set forth that the $500,000 would be forfeited upon the default of the contract by Friendly. Friendly had full and ample opportunity to be heard in regard to the contents of these Orders. Indeed, both Orders

were entered at hearings scheduled for purpose of considering motions for re-hearing filed by Friendly Retirement.

Friendly further argues that no notice was given to them or any other creditors that the Trustee proposed to submit a for-feiture Order on January 12, 1979. No notice was necessary, however, since the Court had twice previously ordered that there would be a forfeiture of the $500,000 in the event of a default. Friendly was aware of their failure to close on December 29, 1978. Therefore, on January 2, 1979, upon being advised by the Trustee of Friendly's default, this Court, in open Court and in the presence of Friendly's counsel, announced that the deposit was deemed to be for-feited and instructed the Trustee to submit a proposed Order which was there-after entered by this Court on January 12, 1979, without an additional hearing.

In light of these facts, Friendly Retirement had full opportunity to be heard prior to the entry of the Forfeiture Order and has been accorded due process of the law.

Furthermore, the record clearly indicates that the January 12, 1979 Order was basically repetitive, since the forfeiture had already been declared by the October 6 Order. The October 6 Order provides for a forfeiture in the event that Friendly is unable to close on or before the date fixed (i.e. December 12, 1978). This Order was a result of objections filed by the Trustee and interested parties to Friendly Retirement's proposed bid to purchase the Kissimmee property, due to Friendly's failure to substantitate their ability to fund such a proposed bid. In spite of these objections, and contrary to this Court's previous statements regarding the closing

of the Kissimmee sale, this Court extended the closing date from December 12, 1978 until December 29, 1978, in order to facilitate a closing of the Kissimmee sale and consummation of the Trustee's Plan of Reorganization. It would be a gross disregard of the record in this proceeding to intimate or to contend that entry of the January 12, 1979 Order was a surprise or that Friendly was not aware from the very beginning, even prior to the making of the deposit, that said deposit would be forfeited in the event that Friendly was unable to close the transaction.

The initial deposit of Friendly Retirement was only $50,000 and said deposit was increased in order to assure that the estate would be indemnified for damages in the event that Friendly was unable to consummate the Kissimmee sale. In this connection, it should be noted that this Court received an offer for $11,000,100

from International Properties Group, a proposed purchaser who substantiated its ability to consummate and close the Kissimmee sale. International Properties' offer was rejected solely upon Friendly Retirement that Friendly should be given an opportunity to purchase the Kissimmee property and would pay a substantially higher price, i.e., $11,480,200. Everyone connected with this proceeding was fully aware that the ability of Friendly Retirement to consummate this sale was questionable from the outset and for this reason this Court insisted upon a substantial deposit in the event that the sale was not consummated. Friendly Retirement's counsel represented to the Court at several hearings that Friendly Retirement had the ability to consummate the Kissimmee sale. Based upon these representations and the fact that Friendly made a substantial deposit in the amount

of $500,000, and knowing that said deposit would be forfeitured in the case of a default, this Court approved the offer of Friendly Retirement Center. Subsequent to this Court's approval of the offer of Friendly Retirement Center, International Properties Group withdrew its offer of $11,000,100.

In its motion, Friendly Retirement seeks to vacate this Court's January 12, 1979 Order on the basis that Friendly did not have ample notice prior to the entry of said Order and therefore was deprived of full opportunity to be heard. Friendly further contends in its motion, that if given an opportunity to be heard, it would present meritious defenses to the forfeiture. At the hearing on February 13, 1979, concerning Friendly's Motion to Vacate, this Court heard evidence from Friendly Retirement and the Trustee in regard to said alleged defenses. Based

upon the evidence presented and argument made by counsel for the Trustee and Friendly Retirement, this Court finds that Frienldy's alleged defenses to forfeiture are without merit for the following reasons:

A. THE SEPTEMBER 13, 1978 and OCTOBER 6, 1978 ORDERS AND THE CONTRACT FOR PURCHASE AND SALE OF ALDERSGATE'S KISSIMMEE PROPERTY PROVIDE FOR FORFEITURE OF THE $500,000 DEPOSIT

Friendly argues in its Motion to Vacate, that the language of this Court's October 6, 1978 Order, to wit:

> "If Friendly has not executed this contract for sale and purchase and delivered it to the Trustee by 5:00 P.M., on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been Ordered by this Court to be treated as an Earnest Money deposit."

limits the forfeitable character of the $500,000 deposit to the condition of Friendly executing and delivering the contract for sale and purchase by October 6, 1978. However, the record,

together with this Court's Order of September 13, 1978, makes it clear that the $500,000 deposit is to be forfeited in the event that Friendly did not close the sale on or before December 12, 1978. The Order of October 6, 1978 and the contract for purchase and sale of Aldersgate's Kissimmee property executed by Friendly Retirement Center and the Trustee confirmed that the deposit would be forfeited in the event that Friendly defaulted by failing to close on or before the above-mentioned date. Therefore, this Court finds this alleged defense of Friendly Retirement Center, Inc is without merit, and hereby overrules said objection.

B. THERE IS NO DEFECT IN TITLE WHICH HAS NOT BEEN CURED BY THE TRUSTEE AND WHICH WOULD ENTITLE FRIENDLY RETIREMENT TO RETURN OF ITS DEPOSIT

Friendly Retirement argues in its Motion to Vacate, that there is a defect in the

title and that the Trustee failed to cure this defect. As evidenced by the testimony heard at the hearing held on February 13, 1979, Paragraph 5 of the contract for sale and purchase sets forth that the buyer shall have fifteen (15) days to examine the title and object in writing to any defects. According to testimony from the Trustee, Friendly Retirement was notified in writing on Monday, October 16, 1978, that the abstracts were completed and ready to be picked up at the law offices of Lee Jay Colling. These abstracts were picked up by Friendly's legal counsel on October 19, 1978, thus, Friendly had fifteen (15) days from October 19, 1978, in which to object to any title defects. On November 6, 1978, four (4) days after the fifteen-day period ending November 2, 1978, the Trustee, Frank W. Reed, received a letter from counsel

for Friendly Retirement indicating that he had found an assignment of fees from counsel for the Trustee to Sun First National Bank of Orlando in the amount of approximately $37,000 and further stating that he was sure that this would be satisfied before December 12, 1978 so that this matter could be closed out. The Trustee's counsel, upon receipt of said letter, telephoned counsel for Friendly Retirement and advised him that this assignment of fees was not a lien on the Aldersgate property in any manner whatsoever.

Based upon the testimony heard on February 13, 1979, this Court finds that Friendly's contention that the Trustee had not cured a defect in title is without merit for the following reasons. This Court finds that the above-mentioned assignment of future fees to be received, if any, when and if this Court should

enter an Order allowing final fees in this proceeding, is not a lien against Aldersgate's Kissimmee property. Furthermore, said assignment contained no legal description, and specifically assigned fees which were "earned or to be earned, and payable to Lee Jay Colling and A.J. Stanton, Jr., as legal counsel for the Trustee, Frank W. Reed, as Trustee".

Assuming, arguendo, that said assignment could be construed as a lien against the Kissimmee property, pursuant to the testimony heard, this Court finds that Friendly Retirement failed to comply with those provisions contained in Paragraph 5 of the contract concerning objections to title. The letter notifying the Trustee of the alleged defect was dated November 3, 1978, one day after the required fifteen days set forth in the contract, and was received on November 6, 1978, four days after the time

specified in the contract. Paragraph 5 of the contract further provides that failure to comply with the fifteen-day requirement waives any objection to title. Furthermore, Paragraph 19 of the contract states that, "time is of the essence" in fulfilling the time requirements set forth in the contract.

In addition, the November 3, 1978 letter was addressed to Frank W. Reed at Kissimmee, Florida, which is not in compliance with Paragraph 18 of the contract of sale and purchase of the Kissimmee property. Said contract specifically states that all notices sent to the seller must be delivered to Frank W. Reed, Trustee, c/o Lee Jay Colling, Esquire, 500 Pan American Bank Building, Orlando, Florida 32801. Friendly Retirement also failed to comply with Paragraph 18 of said contract in that the November 3 letter was not sent certified, return-receipt requested. Therefore, even

assuming arguendo that Friendly had a valid objection to title, this Court finds that said objection was waived by Friendly Retirement due to their failure to follow the specific terms of the contract of purchase and sale of the Kissimmee property. This Court therefore finds this objection of Friendly Retirement Center without merit and hereby overrules said objection.

C. THE TRUSTEE IS ABLE TO PERFORM ALL MATERIAL PROVISIONS OF THE CONTRACT OF PURCHASE AND SALE

Friendly Retirement further contends in its motion to Vacate, that during the period prior to the execution of the contract, the Trustee advised Reverend Thomas of Friendly Retirement Center that 56 beds of the nursing home were not licensed by the State of Florida, but assured Reverend Thomas that all appropriate licenses would be secured by or before the sale. The testimony heard by

this Court on February 13, 1979, conclusively demonstrates that neither Mr. Reed, the Trustee, nor his counsel made such representations to Reverend Thomas or other representatives of Friendly Retirement Center before or after the execution of the contract. Said testimony further showed that on October 4, 1978, as well as at the present time, Aldersgate's Kissimmee nursing home contained 226 beds, but is only licensed for 170 beds. Said testimony further demonstrated that these facts were fully known by Friendly Retirement at all times prior to and subsequent to execution of the contract for purchase and sale. Furthermore, said testimony showed that Friendly Retirement Center did not object to the status of the licensure for the additional fifty-six beds until January 9, 1979, subsequent to the time that Friendly Retirement had failed

to close the Kissimmee purchase on December 29, 1978.

This Court further finds that Paragraph 4 of the contract for purchase and sale of the Kissimmee property specifically states that the buyer has examined the property and agrees to accept the same in an "as is" condition. The testimony heard on February 13, 1979, demonstrated that as of October 4, 1978, the date of the execution of the contract, Aldersgate's Kissimmee nursing home was licensed for only 170 beds. Paragraph 4 of the contract continues to state, "No representations or warranties of any kind are made by the seller, except as specifically set forth herein." In addition, Paragraph 4 states, "the delivery of the deed and bill of sale by the seller and the acceptance of the same by the buyer shall be determined

a full performance and a discharge of every obligation on the part of the seller to be performed hereunder". In light of the clear and unambiguous provisions of the contract for purchase and sale of the Kissimmee property, this Court finds that no parol evidence concerning alleged warranties and representations should be allowed to change the agreement between the parties. Therefore, this Court finds that this alleged defense made by Friendly Retirement Center is without merit and this Court hereby overrules the same.

D. NEITHER THE AGREEMENT BETWEEN THE PARTIES NOR THIS COURT'S ORDERS REQUIRE THAT ANY VALUE BE ASSIGNED TO SETTLEMENT OF THE MARK CONSTRUCTION AND BREWER CLAIMS

Friendly Retirement has argued that because this Court did not determine a value for settlement of the Mark Construction and the Brewer claims, that Friendly

Retirement has not defaulted pursuant to the contract. This Court finds this argument totally without merit. This Court, at the hearings on consideration of Friendly's proposed bid, indicated that it would not place any value on Friendly's settlement of these contested claims. Friendly Retirement Center therefore was under no requirement to agree to settlement of these claims, but gratutiously agreed to the same. Although Friendly Retirement Center filed two Motions for Rehearing concerning the Court's Orders in regard to its bid, Friendly Retirement at no time requested an appropriate ruling from this Court concerning assigning value to these proposed settlements. Accordingly, the contract for purchase and sale was silent in regard to the value to be assigned to the settlement of these claims. Therefore, this Court finds that this alleged

defense raised by Friendly Retirement Center is without merit and this Court hereby overrules the same.

E. THE TRUSTEE DID NOT REPRESENT THAT A SALE TO FRIENDLY RETIREMENT CENTER COULD ONLY BE CONSUMMATED IF HIS PLAN OF REORGANIZATION WAS ACCEPTED BY THE CREDITORS

Friendly Retirement, in its Motion to Vacate, argued that the Trustee and his counsel represented to the Aldersgate bondholders that if the Trustee's Plan of Reorganization was not accepted by the creditors, there could be no sale to Friendly Retirement Center. As shown by the testimony heard at the February 13, 1979 hearing, neither Mr. Reed nor his legal counsel stated that a sale could not occur without acceptance of the Trustee's Plan. To the contrary, said testimony indicated that Mr. Reed and his legal counsel advised the creditors that Friendly Retirement could purchase the property pursuant to a liquidation sale,

a foreclosure sale, or another Plan of Reorganization.

This Court notes that the Trustee's "175 Package" concerning his Plan of Reorganization, the form of which was approved by this Court, specifically explains the other alternatives by which the property may be sold. It should be further noted that the Trustee's Plan of Reorganization would have been accepted by the requisite majority of unsecured creditors had Friendly Retirement settled the Brewer and Mark Construction claims as required by the contract for purchase and sale of the Kissimmee property. In addition, this Court extended the time of balloting until December 31, 1978, in order to give Friendly Retirement Center additional time to satisfy the Brewer and Mark Construction claims, thereby removing these claims from the class of unsecured creditors. Therefore, this

Court finds that this alleged defense raised by Friendly Retirement Center is without merit and this Court hereby overrules the same.

F. THE CONTRACT EXECUTED BY FRIENDLY RETIREMENT CENTER AND THE TRUSTEE WAS A VALID, BINDING CONTRACT ON THE PARTIES

Friendly Retirement argues that certain portions of Paragraph 15 of the contract for purchase and sale were deleted by Friendly Retirement Center. Friendly further contends that the Trustee's counsel advised that these changes would not be approved by the Trustee. As evidenced by testimony heard on February 13, 1979, this alleged defense is without merit. Said deletion was made pursuant to this Court's October 6, 1978 Order, wherein it was stated:

> "Friendly is directed to execute the contract for sale and purchase covering the Kissimmee property in the form previously tendered by the Trustee with deletion of only that portion which required Friendly to deliver an irrevocable letter of credit or letter of commitment within

forty-five (45) calendar days from September 13, 1978".

Since this Court ordered the deletion of the subject language contained in Paragraph 15 of the contract, this Court finds that it was not necessary for either party to initial the changes made to said contract. Furthermore, the testimony heard on February 13, 1979, demonstrated to this Court's satisfaction that the Trustee's counsel never advised Friendly Retirement Center or its counsel that the Trustee would not approve said deletion. Therefore this Court hereby overrules this alleged defense raised by Friendly Retirement Center.

G. THE TRUSTEE DID NOT BREACH THE CONTRACT FOR PURCHASE AND SALE BY SOLICITING OTHER PURCHASERS FOR THE KISSIMMEE PROPERTY

Friendly Retirement also contends in its Motion to Vacate, that the Trustee breached the terms of the agreement by

soliciting other purchasers for the Kissimmee property, while said contract was still in existence. As evidenced by the testimony heard on February 13, 1979, the Trustee did remain in contact with International Properties, Inc., the original highest bidder, and requested that they maintain their interest in purchasing the Kissimmee property in the event that Friendly was unable to close. However, said testimony further conclusively demonstrated that the Trustee in no manner whatsoever solicited purchasers between the period of October 4, 1978, and December 29, 1978, nor did he negotiate with any parties relative to the purchase of the Kissimmee property. Therefore, this Court finds that this alleged defense raised by Friendly Retirement Center is without merit and hereby overrules the same.

H. THE TRUSTEE INFORMED THE COURT CONCERNING FRIENDLY'S FAILURE TO CLOSE

Friendly Retirement Center contends that the Trustee failed to inform this Court on January 2, 1979, of all the facts surrounding Friendly's failure to close and that this Court was therefore misled when it entered the Order of Forfeiture. This Court finds that the Trustee fully disclosed the facts to the Court concerning Friendly's failure to close at the January 2, 1979 hearing. This Court further notes that Friendly Retirement made no objection whatsoever at the January 2, 1979 hearing, although represented at said hearing by legal counsel. On January 2, 1979, this Court indicated from the Bench, that it would enter an Order of Forfeiture and on January 12, 1979, said Order was reduced to writing. Subsequent to this Court's January 12, 1979 Order, Friendly Retirement Center filed its Motion to Vacate fully setting forth the grounds of said Motion. Therefore,

this Court finds this objection of Friendly Retirement Center is without merit and hereby overrules the same.

I. THE FORFEITURE OF FRIENDLY'S $500,000 EARNEST MONEY DEPOSIT IS ENFORCEABLE AS LIQUIDATED DAMAGES

The forfeiture of Friendly's $500,000 earnest money deposit is enforceable as liquidated damages as agreed upon by the parties and is therefore not a penalty. It is well settled under Florida law that the parties may stipulate, in advance, an amount to be paid as compensation as loss or injury, which may result from a breach of contract; such a stipulated sum when determined to be liquidated damages, rather than a penalty, is enforceable under Florida law. The sum stipulated must, under the cirumcstances, be reasonable, and the determination of damages must be uncertain at the time of the contract. See 9A Fla. Jur.; pp. 348-349.

This Court finds that the Trustee and Friendly Retirement Center in their contract for purchase and sale of the Kissimmee property made such a provision for liquidated damages, when they provided for forfeiture of the $500,000 earnest money deposit. Said sum is reasonable due to the fact that the total damages to be incurred by the estate were not ascertainable at the time of the execution of the contract. The Kissimmee property has yet to be sold by the Trustee, and therefore the final price, if any, remains undetermined. In addition, the amount of additional attorney fees to be incurred by the estate in defending the contested Brewer adversary proceeding, which was to be settled by Friendly Retirement Center pursuant to the contract for sale and purchase, reamins undetermined. Under applicable Florida law, provision for liquidated damages is enforceable when actual damages

are difficult to ascertain. See Bluvack, Inc. vs. Walter E. Heller and Company, 331 So. 2d 359 (3rd D.C.A., 1976).

Florida case law has set forth that deposits by the vendee on executory contracts for the purchase of real estate will be construed as liquidated damages, where the amount to be forfeited by the vendee on failure to complete the purchase is not too sufficient to shock the conscience of the Court. See 9A FLA. JUR., p. 356. In Carol Management Company vs. Baring Industries, 257 So. 2d 270, (Fla. App. 1972) a Florida Court found that a deposit only slightly more than 4% of the contract price was reasonable as liquidated damages. In Ruckelhaus vs. Broward County School Board, 494 F.2d 1164 (5th Cir. 1974) the Fifth Circuit in applying Florida law, found that a deposit made pursuant

to a land sales contract constituting 12.3% of the contract price was reasonable as liquidated damages. Therefore, this Court finds that Friendly's total deposit of $508,750 (the $500,000 deposit plus accrued interest of $8,750) which is 4.4% of the total contract price of $11,480,200, is a reasonable provision for liquidated damages under Florida law and therefore enforceable.

Furthermore, in Florida, there is no necessity to prove the actual damages in order to establish that liquidated damages are not a penalty. Murray vs. Hidden Lake Development Corp., 281 So. 2d 537, (Fla. App. 1973). However, at the hearing held on February 13, 1979, concerning Friendly's Motion to Vacate, the Trustee introduced evidence that the estate has and will further incur damages due to the default of Friendly Retirement Center. Said evidence demonstrated that the current

rate of investment of estate funds, (i.e. 9-1/2%) the interest lost on $11,000,000 to be paid on closing, amounts to $2,863 per day. Commencing with December 30, 1978, the day after the closing date, through the hearing date of February 13, 1979, the estate has lost $141,700 in interest. Between February 13, 1979 and May 31, 1979, the estate has lost an additional $306,341 in interest, due to Friendly's failure to close the Kissimmee sale.

It should be further noted that due to the execution of the contract with Friendly Retirement Center, International Properties Group, the original high bidder, who had demonstrated its ability to fund its proposed bid, withdrew its offer of $11,000,100. To date, the highest cash bid received by the estate is $9,750,000, made by the Evangelical Lutheran Good Samaritan Society. Therefore, the estate will be damaged to the extent of

the difference between the sale price agreed upon by Friendly Retirement Center, (i.e. $11,480,200) and the offer submitted by the Evangelical Lutheran Good Samaritan Society (i.e. $9,750,000). It should be further noted that due to Friendly's failure to close the purchase for the Kissimmee property, the estate has incurred and will continue to incur in the future, additional expenses for Trustee's and attorney's fees in connection with the solicitation, negotiation and closing of offers to purchase the Kissimmee property. In addition, the contract for purchase and sale provided that Friendly would settle the claims of Mark Construction Company and the Brewers. Subsequent to Friendly's default on said contract, the Trustee settled the Mark Construction claim for $99,000; the estate would not have had to pay said amount if Friendly had performed pursuant to said contract. On the other hand, the appeal

of the adversary proceeding is still pending. This Court further notes that the estate will continue to incur additional expenses for Trustee's and attorney's fees in defending the Brewer appeal. Even if the Brewers are not successful in their appeal, said creditors will be treated as unsecured creditors and the payment of this claim will be an expense which otherwise would not have been incurred if Friendly Retirement had closed the Kissimmee sale.

This Court finds that under applicable Florida law, actual proof of damages is not necessary to sustain the reasonableness of the provision for liquidated damages, such as is contained in the contract of purchase and sale of the Kissimmee property. This Court further notes that the total damages incurred by the estate as a result of Friendly's failure to close the Kissimmee sale were

difficult to determine at the time of the execution of the contract and remain difficult to determine at present. This Court, however, finds that the testimony heard on February 13, 1979, demonstrates that the total of damages to be incurred by the estate exceeds the amount of Friendly's earnest money deposit. Therefore, this Court finds that the provision for forfeiture set forth in the contract of purchase and sale of the Kissimmee property is reasonable and enforceable under Florida law. This Court further finds that this defense raised by Friendly Retirement Center is without merit and is hereby overruled, and it is,

ORDERED ADJUDGED AND DECREED that the Motion to Vacate filed by Friendly Retirement Center, Inc. be and hereby is denied for the reasons set forth above, and that this Court's Order of January 12, 1979, wherein this Court

ordered a forfeiture of Friendly Retirement Center, Inc's $500,000 earnest money deposit, due to Friendly's failure to close the sale of Aldersgate's Kissimmee property, remain in full force and effect.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 1st day of June, 1979.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Bankruptcy Judge

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 74-383-ORL-BKPT-P

In the Matter of:

ALDERSGATE FOUNDATION, INC.

Debtor.

_____/

ORDER ON EARNEST MONEY DEPOSIT
MADE BY
FRIENDLY RETIREMENT CENTER, INC.
IN RE: SALE OF KISSIMMEE PROPERTY

THIS CAUSE came to be heard sua sponte, in regard to the $500,000 earnest money deposit delivered by Friendly Retirement Center, Inc. to the Trustee of Aldersgate Foundation, Inc. in regard to the purchase of Aldersgate's Kissimmee property. On January 2, 1979, the date previously set for confirmation of the Trustee's Plan of Reorganization, this Court was informed by the Successor Trustee that Friendly Retirement Center, Inc. was in default on that

certain contract of purchase and sale of the Kissimmee property entered between Friendly Retirement Center, Inc. and the Trustee on October 4, 1978. This Court was further informed that Friendly Retirement Center, Inc. was in default due to the fact that it failed to close on said sale on December 29, 1978, and failed to deliver releases, satisfactions of claims, and dismissals of appeals from Mark Construction Company and the Brewers, as provided for in said contract.

After hearing argument from counsel, this Court notes that an Order approving Friendly Retirement Center's bid to purchase the Kissimmee property was entered on August 31, 1978. This Order approved Friendly Retirement Center's cash bid in the amount of $11,480,200, provided that Friendly deposit an additional $450,000 with the Trustee's attorney in addition to the $50,000 previously

deposited by Friendly Retirement Center, Inc. This Court further notes that pursuant to a Motion for Rehearing, filed by Friendly's counsel, this Court entered an Order on September 13, 1978, granting Friendly's motion for rehearing, in light of the fact of the $500,000 earnest money deposit delivered by Friendly to the trustee. Said September 13, 1978 order provided, however, "the deposit heretofore made by Friendly is deemed to be and is treated as a forfeitable earnest money deposit and shall be forfeited in the event of a default; which default occurs if Friendly is unable to meet the remaining terms and conditions of the purchase"; one such term and condition being that Friendly shall proceed to closing and close the transaction on or before the expiration of ninety (90) net calendar days from the date of the entry of

said Order (i.e. December 12, 1978).

This Court further notes that pursuant to a motion for rehearing filed by Friendly Retirement Center, Inc. in regard to this Court's order of September 13, 1978, an Order was entered on October 6, 1977. Said October 6, 1978 Order provided that the $500,000 deposit, made by Friendly and ordered by this Court, was to be deemed as a forfeitable earnest money deposit in the event that Friendly failed to perform the terms of the contract for sale and purchase. Said Order further reiterate that Friendly shall proceed to closing and close this transaction on or before December 12, 1978, and that this Court would not consider under any circumstances any extensions or requests for extenssions of time to close this transaction.

On December 5, 1978, this Court was informed by the Successor Trustee that

a requisite majority of affirmative votes on the Trustee's Plan of Reogranization had not been received from the class of unsecured creditors. This Court was further informed that the class of unsecured creditors did not approve the Trustee's Plan due to the fact that Mark Construction Company voted to reject said Plan and the Brewers failed to return their ballot. At said December 5, 1978 hearing, this Court noted that Friendly Retirement Center, Inc., had agreed to settle the claims of Mark Construction Company and the Brewers at the closing of the sale of the Kissimmee property, which was scheduled for December 12, 1978. At said December 5th hearing, this Court was informed that Friendly Retirement Center's lender had requested that the closing be rescheduled from December 12, 1978, to December 29, 1978. This Court therefore entered an Order on

December 18, 1978, extending the time in which to file ballots concerning the trustee's Plan of Reorganization until December 31, 1978, and rescheduling the confirmation hearing until January 2, 1979, so that the deadline for receiving ballots and the hearing on confirmation would occur subsequent to the December 29, 1978 closing and settlement of the Mark and Brewer claims.

THIS COURT BEING FULLY ADVISED in the premises hereof, it is, therefore,

ORDERED, ADJUDGED AND DECREED that Friendly Retirement Center, Inc. shall be deemed to be in default on the contract for purchase and sale of Aldersgate's Kissimmee property, due to its failure to close on December 29, 1978, and failure to deliver releases, satisfactions of claims, and dismissals of appeals from Mark Construction Company and the

Brewers, as provided for in said contract, and it is,

FURTHER ORDERED, ADJUDGED AND DECREED that the $500,000 earnest money deposit be and hereby is forfeited by Friendly Retirement Center, Inc., and shall remain the property of the Trustee of Aldersgate Foundation, Inc. on behalf of the estate and Friendly Retirement Center, Inc. shall have no claim or interest in said deposit whatsoever, provided, that execution of this Order shall be suspended until January 30, 1979, so that the Trustee may attempt to renegotiate the terms of the purchase and sale of Aldersgate's Kissimmee property to Friendly Retirement Center, Inc., and in the event such a sale is renegotiated by the Trustee and Friendly, the terms and conditions of such sale shall be presented to this Court at a hearing scheduled for 3:00 o'clock P.M., on January 30, 1979.

DONE AND ORDERED IN CHAMBERS at Tampa, Florida, this 12th day of January, 1979.

/s/
ALEXANDER L. PASKAY
Bankruptcy Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the ORDER ON EARNEST MONEY DEPOSIT MADE BY FRIENDLY RETIREMENT CENTER, INC., IN RE: SALE OF KISSIMMEE PROPERTY has been furnished by mail this 17th day of January, 1979, to the following:

K. Rodney May, Esq.
Division of Corporate Regulation
Securities & Exchange Commission
500 N. Capitol Street, Room 2324
Washington, D.C. 20549

Robert H. Roth, Esq.
Roth, Weiss & Worman, P.A.
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Apopka, Florida 32703

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Tampa, Florida 33601

Jules Cohen, Esquire
808 North Mills Avenue
Orlando, Florida 32803

/s/ Charles R. George, III
500 Pan American Bank Bldg.
Orlando, Florida 32801
(350) 843-2684

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In the Matter of	: IN THE PROCEEDINGS FOR THE REORGANIZATION
ALDERSGATE FOUNDATION, INC.	: OF A CORPORATION UNDER CHAPTER X OF THE BANKRUPTCY
DEBTOR	: ACT
	No. 74-383-Orl-Bk-P

ORDER GRANTING APPLICATION TO AUTHORIZE COURT REPORTER TO CORRECT TRANSCRIPT OF HEARING HELD JANUARY 2, 1979

THIS CAUSE came to be heard on Application to Authorize Court Reporter to Correct Transcript of Hearing held January 2, 1979, of Johnie A. McLeod, attorney for the Brewers, with the approval of Robert H. Roth, attorney for the Brewers, on the 14th day of March, 1979. This Court having heard argument and being fully advised in the premises, it is, therefore,

ORDERED, ADJUDGED AND DECREED that said Application be granted and the

Court Reporter is hereby authorized and ordered to correct page 1 of the transcript to disclose that Johnie A. McLeod, Ralph McDermid and Robert H. Roth appeared at the hearing on January 2, 1979, on behalf of the Brewers and not Friendly Retirement Center, Inc.

DONE AND ORDERED in Chambers, at Tampa, Florida, this 19th day of April 1979.

/s/ Alexander L. Paskay
Alexander L. Paskay
Bankruptcy Judge

Copies to:

Johnie A. McLeod, Esq.
P.O. Drawer 950
Apopka, Florida 32703

Robert H. Roth, Esquire
P.O. Box 1687
Orlando, Florida 32802

Lee Jay Colling, Esq.
500 Pan American Bank Building
Orlando, Florida 32801

Ms. Margery E. Hill
Court Reporter
401 Metcalf Bldg.
Orlando, Florida 32801

APPENDIX H

CONTRACT FOR SALE & PURCHASE

THIS AGREEMENT has been made and entered into on the ____ day of _____, 1978, by and between FRANK W. REED, Trustee for Aldersgate Foundation, Inc., a Florida non-profit corporation hereinafter sometimes referred to as "seller", and FRIENDLY RETIREMENT CENTER, INC., a Florida Corporation, hereinafter sometimes referred to as the "Buyer."

W I T N E S S E T H:

WHEREAS, the Seller is the debtor in the Federal Reorganization proceeding identified as "In the Matter of Aldersgate Foundation, Inc., Debtor, United States District Court, Middle District of Florida, Orlando Division, Case No. 74-383-ORL-BKPT-P"' and

WHEREAS, the Seller desires and has agreed to sell certain real and personal property described herein, in furtherance of its purpose of effecting a feasible

Plan of Reorganization; and

WHEREAS, the Buyer desires and has agreed to purchase and acquire the subject property.

NOW THEREFORE, in consideration of the mutual covenants contained herein and for other valuable consideration the receipt of which is recognized, it is agreed as follows:

1. PREAMBLE: The preamble to these presents forms a part hereof and is thus binding upon the parties.

2. PROPERTY: The Kissimmee facility of Aldersgate concerning approximately 253 acres of real property in Osceola County, Florida, 861 rental units, 297 mobile home lots, 68 mobile home units and a 226 bed nursing home, and all other improvements located thereon, and personal property used in the operation thereof.

3. PURCHASE PRICE: The purchase price of the property is Eleven Million Four

Hundred Eighty Thousand Two Hundred Dollars ($11,480,200.00) of which Three Hundred Thousand Dollars ($300,000.00) is allocated to and represents the purchase price for the personal property. The Buyer has delivered cashier's checks in the amount of Five Hundred Thousand Dollars ($500,000.00) as a deposit to be applied against the purchase price at closing, receipt of which is hereby acknowledged. The purchase price, adjusted for deposits and prorations provided for herein shall be paid to Seller at closing by cash or cashier's check, or by federal funds wired to such account as shall be designated by Seller.

4. CONDITION OF PROPERTY AND SELLER'S REPRESENTATIONS:

The Buyer has had the opportunity to examine the property, the improvements thereon, and the personal property described herein, and agrees to accept the same in an as-is condition subject to the provisions of

Paragraph 9. No representations or warranties of any kind are made by the Seller except as specifically set forth herein. The delivery of the Deed and the Bill of Sale by the Seller and the acceptance of the same by the Buyer shall be deemed a full performance and a discharge of every obligation on the part of the Seller to be performed hereunder.

5. EVIDENCE OF TITLE TO REAL PROPERTY:

Within fifteen (15) days after the execution of this Contract by the last party signing herto the Seller shall deliver to the Buyer a complete abstract of title evidencing that the Seller's title is good, insurable and free of liens and encumbrances except those which shall be removed by order of the Bankruptcy Court.

Good and insurable title may, at Seller's option, be evidenced by the issuance of an owner's title insurance, commitment and policy, to be obtained at Seller's expense and written on a reputable title insurance company in the amount of the purchase price and in accordance with the terms of this Agreement. If the Buyer elects to purchase a title insurance policy pursuant to the commitment, the same shall be made available to the Buyer at the lowest rate allowed by law in the State of Florida.

The Buyer shall have fifteen (15) days to examine the title and object in writing to any defects. If the Buyer notifies the Seller of any defects, the Seller may, at its option, (a) cure the same by issuing a title commitment only as set forth above and insuring over the objections; or (b) seek to cure said defects;

or (c) elect to cancel this Contract and return Buyer's deposit. The Buyer shall have the right to cancel this Contract if the Seller has not issued the title insurance commitment as set forth above or cured the defects within sixty (60) days after receipt of the notice of defects and his deposit shall be returned forthwith with interest earned, if any.

6. OBLIGATIONS OF SELLER PENDING CLOSING:

The Seller agrees (a) to maintain the property in its present condition pending the closing; (b) to not enter into, renew, extend, or modify any contracts or other agreements affecting the property without the Buyer's consent; (c) to notify the Buyer in writing within 48 hours of the receipt of any notice of a proposed zoning change or any violation relating to any zoning, building, housing, plumbing, electrical, safety, fire or health law, ordinance or regulation. If

Seller is unable to maintain the property as set forth above, normal wear and tear excepted, or if any agreements affecting the property are entered into, or if any notices are received as described above, the Buyer, at his option, may rescind this Contract by notifying the Seller in writing of its election within ten (10) days of the receipt of notice of any such occurrences and the deposit shall be returned forthwith; otherwise, such objections shall be waived.

7. CLOSING: This transaction shall be closed and possession shall be delivered on or before December 12, 1978. The closing shall be held in the offices of Lee Jay Colling, 500 Pan American Bank Building, Orlando, Florida.

Title to the real and personal property shall be conveyed by a Trustee's Bill of Sale and Deed free and clear of all liens and encumbrances except

for taxes for the year 1978, easements, and dedications of record, matters of survey, and rules and regulations of all governmental agencies having jurisdiction.

The Seller agrees to convey to the Buyer at the time of closing all documents in its possession affecting the premises and the property thereon, including but not limited to plans and specifications for the land and improvements, all unexpired warranties and guarantees, and assumed licenses. Except for all records or documents needed by the Trustee in connection with the reorganization proceeding in the event the records desired by Buyer are retained by Trustee, copies of such records as may be necessary to the Buyer's operation of the business shall be made with the expenses thereto to be born by the Buyer.

Except for the Seller's attorney's fees, fees of the Seller, including stamps on deed, abstract charges, premiums for any title insurance commitment, and expenses to cure title defects, if any, all normal closing costs shall be paid by the Buyer

All taxes, utility charges, insurance premiums, rentals, leases, medicare and medicaid payments, fees for assignable licenses, fuel expense and charges under service contracts assumed by the Buyer shall be prorated as of the date of closing. Seller shall retain ownership of and right to collect all outstanding rental payments and other receivables existing at the closing date.

8. TEMPORARY POSSESSION BY SELLER OF CERTAIN PERSONAL PROPERTY:

Seller and Buyer agree that upon closing the Seller may retain possession of at least five 4-drawer file cabinets presently being used by the Trustee

for reorganization matters.

9. SURVEY AND INSPECTION: The Buyer or his agents shall have the right to inspect and make a survey of the property at anytime during the first sixty (60) days subsequent to the date of execution of this Contract, but only at reasonable times and after providing the Seller with at least 48 hours written notice. If a survey, certified by a registered surveyor, shows any encroachments, strips of gores, or rights of way or easements on the premises which adversely affect its use or development, the Buyer shall have the right to rescind this Contract by providing the Seller written notice of the election to do so within ten (10) days of the receipt of said survey, and the deposit shall be returned forthwith; otherwise, any such objections shall be waived.

10. RISK OF LOSS: If the improvements are damaged by fire or casualty before delivery of the deed and can be restored to substantially the same condition as now within a period of 60 days thereafter, Seller shall so restore the improvements and the closing date and date of delivery of possession hereinbefore provided shall be extended accordingly. If Seller fails to do so, the Buyer shall have the option of (1) taking the property as is, together with insurance proceeds, if any, or (2) cancelling the Contract, and all deposits are to be forthwith returned to the Buyer and all parties shall be released of any and all obligation and liability.

11. ESTABLISHMENT OF OFFICE PRIOR TO CLOSING:

Upon Buyer's compliance with Paragraph 3 above, Buyer shall have free and complete access to the property (to be exercised in a manner so as not to interfere with

the day to day operation of the project by Seller), and Buyer may establish an office on the property in the old rest home located on Highway 17-92, the establishment of which shall be at Buyer's expense.

12. EXISTING TENANTS: The Buyer shall accept all tenants in residency at the date of closing and permit said tenants to remain as such for a one-year period and so long as they abide by all of the terms of their tenancy as established by Buyer and pay the required rent.

13. HANSEN PLAN TENANTS: The Buyer understands that forty (40) rental units and five (5) mobile homes are occupied by Hansen Plan tenants, and an additional 0 Hansen Plan tenants who presently reside at Orange City but who may move to Kissimmee. Buyer agrees to accept said tenants and permit them

to occupy the units they presently occupy, or in the case of Orange City Hansen Plan tenants, the units they may occupy in the future. The continued occupancy shall be at the rent level as is charged other tenants of comparable units, less the specific rent credit to which each Hansen Plan tenant is entitled. The Hansen Plan tenants, their rent credit and unit number are set forth in Exhibit "A" attached hereto and made a part hereof.

14. SETTLEMENT OF SUITS: (a) The adversary proceedings instituted by the Brewers, In the Matter of Aldersgate Foundation, Inc., Debtor, United States District Court, Middle District of Florida, Orlando Division, Case No. 74-383-ORL-BKPT-P, and the suit instituted by the Brewers in said Court against ComBank/Winter Park, Case No. 75-192-ORL-CIV-Y will be dismissed with prejudice on the closing

date. The Brewers will, on the closing date, cancel two Promissory Notes dated February 26, 1971 and April 10, 1971, totaling $1,287,534.00 plus 4% interest from 5/1/74, and the mortgages securing same. (b) Mark Construction Company will cancel its claim in the approximate amount of $330,000.00 on the closing date. On or before September 19, 1978, Buyer will deliver to Seller written evidence of the consent of the Brewers and Mark Construction Company to the release of their claims on closing date in accordance with this paragraph.

15. OBLIGATIONS OF BUYER PENDING CLOSING:

The Buyer agrees: (a) to file with the Court, along with a copy to the Seller, on or before 5:00 p.m., September 18, 1978, an effective loan commitment from an approved lending institution which shall remain valid and outstanding and irrevocable until at least December 13, 1978,

in the amount not less than Eight Million Five Hundred Thousand Dollars ($8,500,000.00); ~~and (b) to file with the Court, along with a copy to the Seller, on or before October 27, 1978, an irrevocable letter of credit from an approved lending institution valid until at least December 13, 1978, in the amount sufficient to pay the entire purchase price as set forth in Paragraph 3, or, in the alternative, to file with the Court, along with a copy to the Seller, on or before October 27, 1978, an irrevocable letter of commitment from an approved lending institution valid until at least December 13, 1978, in the amount sufficient to pay the entire purchase price as set forth in Paragraph 3.~~ S/ "A.E."

16. DEFAULTS: The deposits made pursuant to Paragraph 3 above by the Buyer shall be placed by the Seller in an interest bearing account until the date of

closing, whereupon said funds, together with interest thereon, if any, shall be applied toward and be a part of the purchase price. If the Buyer fails to perform any of the covenants to this Contract within the time specified the deposits held by Seller, together with interest accrued thereon, shall be retained by and for account of the Seller as consideration for the execution of this Contract and in full settlement of any claims for damages and all parties shall be relieved of all obligations under this Contract or the Seller, at its option, may proceed at law or in equity to enforce its legal rights under this Contract including but not limited to, the right to bring suit for specific performance. In the event this Contract is not approved by the U.S. Bankruptcy Court or if the Seller cannot or fails to convey the quality and quantity of title

as required herein, then such deposits, together with interest thereon, shall be returned to the Buyer.

17. REAL ESTATE COMMISSIONS: The parties hereto covenant and agree that there is no real estate broker entitled to any commission as a result of the consummation of this Agreement and in the event a claim is made against either party hereto arising from any act of the party, the party committing the act shall indemnify and hold the other party harmless from any and all liability arising from said claim including a reasonable attorney's fees incurred in defending same.

18. NOTICES: All notices to be sent pursuant to the terms hereof shall be deemed sufficient when either personally delivered or sent via United States mails, certified, return receipt requested, and respectively addressed as follows:

TO THE SELLER: FRANK W. REED, Trustee
c/o Lee Jay Colling, Esq.
500 Pan American Bank Blg.
Orlando, Florida 32801

TO THE BUYER: Friendly Retirement
Center, Inc.
808 Hastings Drive
Kissimmee, Florida 32741

19. TIME OF THE ESSENCE: Time is of the essence of this Contract.

20. In the event a condemnation suit is brought against the Seller, then the Buyer shall have the right to any proceeds as a result of said condemnation.

21. BINDING EFFECT: This Agreement shall inure to the benefit of and be obligatory upon the heirs, personal representatives, successors and assigns of the parties hereto. The parties hereto agree that this offer shall not be recorded among the public records of Osceola County, Florida. The parties hereto acknowledge that there are no other representations or agreements

between the parties hereto unless set forth in writing.

WITNESS our hands and seals this ____ day of _____, 1978.

Witnesses: SELLER: DATE: 9/15/78

/s/L.J. Overty

/s/D.B. Beattie
(As to Seller)

/s/ Frank W. Reed
FRANK W. REED, Trustee in Reorganization of Aldersgate Foundation, Inc.

Witnesses: BUYER: DATE: 10/4/78

/s/J.A. McLeod

/s/R.M. McDermid
(As to Buyer)

FRIENDLY RETIREMENT CENTER, INC.

/s/ Arthur E. Thomas, Pres.
ARTHUR E. THOMAS, PRESIDENT

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 74-383-ORL-BKPT-P

In the Matter of:

ALDERSGATE FOUNDATION, INC.,

Debtor.

_____/

ORDER ON MOTION FOR REHEARING

THIS CAUSE came before the Court on the motion filed by Friendly Retirement Center, Inc. (hereafter "Friendly"), Estill Brewer, Mary Brewer and Brewer Omega Corporation (formerly known as Omega Corporation), seeking a rehearing on that portion of the Order entered by the Court on September 13, 1978 which required Friendly, within forty-five calendar days from the date of that Order, to file an irrevocable letter of credit or a letter of commitment from an approved lending institution in the full

amount of the purchase price approved by this Court for the purchase of the Kissimmee property by Friendly.

The Court having heard oral argument from the attorneys for the Trustee, ComBank/Winter Park, Friendly and the Brewers, hereby grants the motion for a rehearing and amends its Order dated September 13, 1978 in the following respects:

1. The requirement that Friendly deliver an irrevocable letter of credit or a letter of commitment by an approved lending institution within forty-five calendar days from September 13, 1978 is hereby stricken.

2. Friendly is directed to execute the Contract For Sale And Purchase covering the Kissimmee property in the form previously tendered by the Trustee, with the deletion of only that provision which required Friendly to deliver an irrevocable letter of credit or letter of

commitment within forty-five calendar days from September 13, 1978. If Friendly has not executed this Contract For Sale And Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been ordered by this Court to be treated as a forfeitable earnest money deposit.

3. Friendly shall proceed to closing and close this transaction on or before December 12, 1978. The Court reiterates that portion of its prior Order which provided that the Court would not consider under any circumstances any extensions or requests for extensions of the time to close this transaction.

DONE AND ORDERED in Chambers in Tampa Florida this 6 day of October, 1978.

/s/Alexander L. Paskay
ALEXANDER L. PASKAY
Bankruptcy Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 6 day of October, 1978 to the parties listed on the attached Schedule A.

/s/ Sprague

SCHEDULE A

Jerome Bornstein, Esq.
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Orlando, Florida 32801

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500 Pan American Bank Bldg.
Orlando, Florida 32801

Johnie A. McLeod, Esq.
Post Office Drawer 950
Apopka, Florida 32703

CERTIFICATE OF SERVICE

I, Johnie A. McLeod, hereby certify that on this 30th day of November, 1981, copies of the foregoing Appendix to Petition for Writ of Certiorari were furnished by mail, correct postage prepaid, to Douglas B. Beattie, Esquire, 500 Pan American Bank Building, Orlando, Florida 32801, Attorney for Respondent.

/s/ JOHNIE A. McLEOD

Johnie A. McLeod
P.O. Drawer 950
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Apopka, Florida 32703
Telephone: (305)886-3300
Attorney for Petitioner

Ralph M. McDermid
Of Counsel

Opposition

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In the Matter of:
ALDERSGATE FOUNDATION, INC.

FRIENDLY RETIREMENT CENTER, INC.
Petitioner,

v.

LEE JAY COLLING, Successor Trustee,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS B. BEATTIE
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Orlando, Florida 32801
Telephone: (305) 843-2684
Attorney for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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FRIENDLY RETIREMENT CENTER, INC.
Petitioner,

v.

LEE JAY COLLING, Successor Trustee,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

The facts are stated fully and accurately in the Order of the Bankruptcy Judge dated June 1, 1979 (Petitioner's Appendix E) and the Memorandum Opinion of the United States District Court for the Middle District of Florida (Petitioner's Appendix D) and the decision of the United States Court of Appeals for the Fifth Circuit (Petitioner's Appendix A).

SUMMARY OF ARGUMENT

The decision below is correct and in accordance with the body of law applicable to the instant facts. The decision of the

United States Court of Appeals for the Fifth Circuit is not in conflict with the decisions of other Courts of Appeal or this Court and does not provide any basis for review by this Court. There is no question of law at issue that justifies the grant of a writ of certiorari in this case.

ARGUMENT

Contrary to Petitioner's arguments, the chronology of events and references to the record which are incorporated by reference in the Statement of Case clearly establish that Petitioner had more than sufficient notice that failure to close the transaction would result in forfeiture of its deposit. To suggest to this Court that Petitioner was not aware that its $500,000 deposit would be automatically forfeited if it defaulted is without any basis in fact.

On August 15, 1978, the Bankruptcy Court heard argument from the Trustee and other interested parties concerning acceptance of Petitioner's second amended bid and its ability to fund the purchase. The Bankruptcy Court, finding it to be in the best interest of the estate and the creditors to maximize the purchase price for the Kissimmee property, entered an Order on August 24, 1978, directing Petitioner to make an additional deposit of $450,000 to the Trustee within ten (10) days, thereby bringing the total amount of the deposit to $500,000. In addition, the Bankruptcy Court ordered Petitioner to confirm its bid in writing to the Trustee's attorney and directed Petitioner to negotiate a final contract for the purchase of the Kissimmee property by August 30, 1978.

At the hearing on August 30, 1978, the Trustee reported that Petitioner had failed to comply with the Bankruptcy Court's Order of August 15, 1978, in every respect, including the failure to deposit the additional $450,000. The Trustee also informed the Bankruptcy Court of Petitioner's unwillingness to furnish written evidence of its ability to fund the second

amended bid. International Properties had furnished the Trustee with evidence that satisfied the Trustee that it could fund its previous bid of $11,000,000 cash. For these reasons, the Trustee objected to the acceptance of Petitioner's second amended bid and recommended to the Bankruptcy Court that the previous bid of International Properties be accepted. As a result of the hearing, the Bankruptcy Court entered an Order on August 31, 1978, tentatively approving Petitioner's second amended bid. The Order provided that Petitioner had to deposit with the Trustee's attorney a cashier's check in the amount of $450,000 on or before September 1, 1978. The Bankruptcy Court further ordered that on or before September 9, 1978, Petitioner had to provide "proof of its ability to perform its proposed bid by submitting a written commitment by an approved lending institution to fund the purchase price of $11,480,200 or by submitting an irrevocable letter of credit in the amount of $11,480,200, less any amount of deposit made herein." In addition, the Bankruptcy Court ordered that Petitioner "submit to the Trustee an executed contract of purchase and sale in a form acceptable to the Trustee on or before September 9, 1978."

On September 5, 1978, Petitioner filed a motion for reconsideration of the August 31, 1978, Order asserting that the Bankruptcy Court's requirement of an irrevocable letter of credit or written commitment for the purchase price was "unfair, prejudicial, and capricious." Although this was Petitioner's contention in its motion, during the hearing on August 30, 1978, Petitioner made no such objections and, in fact, represented to the Bankruptcy Court that it could obtain such proof of its ability to perform. A hearing on Petitioner's motion for reconsideration was held on September 12, 1978. At the hearing, the Bankruptcy Court was informed that International Properties had withdrawn its bid to purchase the Kissimmee property. Considerable discussion was had concerning the nature of Petitioner's $500,000 deposit. During the hearing, counsel for Petitioner stipulated and agreed that the $500,000

deposit would be forfeited if Petitioner defaulted and did not close the transaction (See colloquy, Petitioner's Appendix A22-A24, fn 3; A46-A48).

On September 13, 1978, the Bankruptcy Court entered an Order granting Petitioner's motion for reconsideration (Appendix C). Specifically, the Bankruptcy Court found that "in light of the fact that the estate no longer has an alternative bid and in light of the fact that a deposit actually made by Petitioner, to-wit: the sum of one-half million dollars, is a sufficient earnest money deposit" reconsideration was warranted. As a result, the Order of August 31, 1978, was amended to provide that "the deposit heretofore made by Petitioner is deemed to be and is treated as a forfeitable earnest money deposit and shall be forfeited in the event of a default." The Order specified when and how a default would occur, including specific reference to Petitioner's failure to close within 90 days, and decreed that the Bankruptcy Court would not consider, under any circumstances, any extensions of time with regard to any of the deadlines set forth in the Order.

On September 25, 1978, Petitioner filed a motion for rehearing of the Order entered on September 13, 1978, (Appendix B) requesting only that the requirement of an irrevocable letter of credit from an approved lending institution in the full amount of the purchase price be deleted and that Petitioner be given an additional 30 days within which to close the transaction. In its motion, Petitioner admitted the Order of September 13, 1978, provided for the forfeiture of the $500,000 deposit if it failed to close the transaction. A hearing on the matter was held on October 4, 1978. At that hearing, the Bankruptcy Court was advised that Petitioner had not executed the contract for purchase and sale as the Bankruptcy Court had previously ordered. The motion for rehearing was granted by Order of the Bankruptcy Court dated October 6, 1978, (Appendix A) and the Order of September 13, 1978, was amended in order to delete the re-

quirement of an irrevocable letter of credit or a letter of commitment, to require Petitioner to execute the contract for sale and purchase and deliver it to the Trustee by 5:00 P.M. on October 6, 1978, and to require Petitioner to proceed to close the transaction on or before December 12, 1978. The Order of October 6, 1978, did not amend its prior orders that failure to close within the time specified would result in forfeiture of Petitioner's $500,000 deposit.

On October 4, 1978, Petitioner executed the contract for sale and purchase and delivered it to the Trustee. By the terms of the contract, the closing was set for December 12, 1978. On December 5, 1978, at a hearing scheduled for other purposes, the Bankruptcy Court was informed by Petitioner that it was unable to close on December 12, 1978, as required in the contract. Petitioner requested an extension of the closing date until December 31, 1978. During the December 5, 1978, hearing, the Bankruptcy Court was informed by the Trustee that the requisite majority of Kissimmee and Englewood creditors and priority creditors had voted favorably for the Trustee's Plan of Reorganization, but the requisite majority of unsecured creditors had failed to accept the plan. The Bankruptcy Court was informed that the class of unsecured creditors was controlled by Mark Construction Company and the Brewers, who together, held approximately 55 percent of the dollar amount of all unsecured claims and that pursuant to the contract for sale and purchase, Petitioner had agreed to satisfy the Mark Construction and Brewers claims against the estate. On December 12, 1978, the Trustee reported to the Bankruptcy Court that the parties had agreed that the sale to Petitioner would be postponed until December 29, 1978. On December 18, 1978, the Trustee sent out notices to all creditors and parties in interest extending the closing date for the sale of the Kissimmee property to December 29, 1978. Also, since Petitioner was required to satisfy the claims of Mark Construction and the Brewers, a

hearing concerning confirmation of the Trustee's Plan of Reorganization was scheduled and noticed for January 2, 1979.

No changes, amendments or modifications concerning the forfeiture of Petitioner's $500,000 deposit in the event of its failure to close were made to the preclosing Orders of the Bankruptcy Court or the contract for sale and purchase.

Petitioner was unable to close on December 29, 1978, for the reason that it was not able to fund the purchase of the Kissimmee property. At the hearing on January 2, 1979, the Trustee informed the Bankruptcy Court of Petitioner's failure to close the transaction and requested that the Bankruptcy Court enter an Order declaring the $500,000 deposit forfeited. On January 12, 1979, an Order was entered by the Bankruptcy Court declaring the $500,000 deposit forfeited as a result of Petitioner's failure to close the transaction and deliver releases, satisfaction of claims and dismissals of appeals. However, execution of the Order of January 12, 1979, was suspended until January 30, 1979, in order to give Petitioner another opportunity to close the transaction. Petitioner was still unable to close as of January 30, 1979.

Thus, the facts establish that Petitioner not only was aware that it had to close the transaction or it would forfeit the $500,000 deposit, but also that Petitioner stipulated and agreed to that condition of forfeiture in order to pursuade the Bankruptcy Court to accept its bid and favorably consider its numerous requests to extend the time for closing. At no time prior to the order of forfeiture did Petitioner object to forfeiture on the basis of failure to close the transaction. The Bankruptcy Court suspended execution of the order of forfeiture until January 30, 1979, in an attempt to allow Petitioner to close prior to an actual forfeiture. Had Petitioner been capable of closing, it is evident that no forfeiture would have resulted.

Although found to be insignificant by the Court of Appeals, Petitioner argues that it was not present at the bankruptcy

hearing held on January 2, 1979. It is uncontroverted that Petitioner's counsel was present at the hearing. Petitioner suggests that its counsel was representing another client and therefore, had no duty to speak on behalf of Petitioner when the subject of forfeiture was discussed. Although Petitioner's counsel certainly had an opportunity to speak at the hearing, he was silent and did not object to the forfeiture, he did not assert any defenses, nor did he request a hearing on the forfeiture. See Memorandum Opinion of United States District Court for the Middle District of Florida (Petitioner's Appendix A60-A62).

In its appeal to the United States Court of Appeals for the Fifth Circuit, Petitioner, for the first time in this case, raised the argument that the Trustee waived the provisions in the contract for sale and purchase which declared the $500,000 deposit forfeited. No such claim was ever made to the Bankruptcy Court or on appeal to the United States District Court for the Middle District of Florida. Under the authority of *Image of Gr. San Antonio, Texas* v. *Brown*, 570 F. 2d 517 (5th Cir. 1978), this issue should not be considered by this Court. This was raised by Respondent in his brief to the Court of Appeals. The Order of the United States Court of Appeals for the Fifth Circuit (Petitioner's Appendix A), contains no reference whatsoever to this argument which Petitioner again attempts to raise in this Court.

Further, the law in Florida is well settled that a purchaser in default cannot recover from the seller an earnest money deposit paid in part performance of an executory contract. *Ruckelshaus* v. *Broward County School Board*, 494 F. 2d 1165 (5th Cir. 1974); *Williams* v. *Crouch*, 186 So. 2d 491 (Fla. 1966); *Beatty* v. *Flannery*, 49 So. 2d 81 (Fla. 1950); *Pico Development Corporation* v. *Edwards*, 367 So. 2d 698 (Fla. 4th D.C.A. 1979). Admittedly, the rule permitting forfeitures is not absolute. In *Beatty, supra*, the Supreme Court of Florida recognized three exceptions to the general rule, to-wit: (1) intimation of

fraud on the part of the vendor; (2) facts suggesting mutual rescission; and (3) failure of the purchaser to fulfill the contract due to matters beyond his control giving the vendor a benefit, the retention of which is shocking to the conscience of the court. 49 So. 2d at 82. In the instant matter, fraud on the part of the Trustee has never been alleged by Petitioner. In addition, mutual rescission has never been alleged by Petitioner and is not at issue in this case. Petitioner also has never claimed that it could not close due to matters beyond its control. Further, the $500,000 deposit represents 4.4 percent of the contract price and its retention is not "shocking to the conscience of the Court" so as to warrant reversal. See *Ruckelshaus, supra,* (forfeiture of deposit representing 12.3 percent of the contract price found reasonable); *Beatty, supra,* (forfeiture of deposit representing 10 percent of the contract price found reasonable; *O'Neill* v. *Broadview, Inc.*, 112 So. 2d 280 (Fla. 2d D.C.A. 1959) (forfeiture of deposit representing 14 percent of the contract price found reasonable; *Bruce Builders, Inc.* v. *Goodwin*, 317 So. 2d 868 (Fla. 4th D.C.A. 1975) (forfeiture of deposit representing 4 percent of the contract price found reasonable).

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner suggests that under Florida law a forfeiture cannot be invoked under the provisions of a contract for sale and purchase unless the parties seeking the forfeiture proves strict compliance with the applicable provisions of the contract. The primary authority cited by Petitioner is *Picard* v. *Burrows*, 304 So. 2d 455 (Fla. 1st D.C.A. 1974). The court, in *Picard*, stated that the parties seeking forfeiture must show compliance with the contract or that such compliance has either been excused or prevented by the party against whom forfeiture is sought. *Id.* at 456. Assuming arguendo that *Picard* is applicable in the instant case, the facts clearly establish that Petitioner expressly excused any showing of compliance by the Trustee by stipulating and agreeing to the automatic forfeiture of its deposit if it did not close the transaction. In addition, any inability to perform the

contract by the Trustee was directly caused by Petitioner (See Petitioner's Appendix A28-A30).

In *Guerrera* v. *Eldred Construction Corporation*, 378 So. 2d 327 (Fla. 5th D.C.A. 1980), the court upheld the forfeiture of purchaser's earnest money deposit and found that the trial court's decision contained the necessary implication that Appellee proved strict compliance with the contract, or that such compliance had been excused or prevented by Appellants. *Id.* at 328. Similarly, in the instant case, the Orders of January 12, 1979, (Petitioner's Appendix F) and June 1, 1979, (Petitioner's Appendix E) contained the Bankruptcy Court's findings and necessary implication that the Trustee proved strict compliance with the contract or that such compliance had been excused or prevented by Petitioner.

The numerous authorities cited by Petitioner concerning the due process requirements of reasonable notice prior to forfeiture are wholly inapplicable to the instant facts. As an example, in *Bank of Marin* v. *England*, 385 U.S. 81 (1966), and *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972), there was no notice of any kind given prior to the person's property being taken. *Groppi* v. *Leslie*, 404 U.S. 496 (1972), involved a habeas corpus proceeding by a Petitioner who was in prison pursuant to a resolution by a State Legislature that he was guilty of contempt. The Defendant was found guilty without any notice and an opportunity to present a defense. In *Ricker* v. *United States*, 417 F. Supp. 133 (D. Me. 1976), the court held that notice by publication was not sufficient to deprive mortgagors of their property. Also, the court stated that correspondence accelerating the amount due, demanding payment in full and threatening foreclosure did not give clear notice that foreclosure proceedings would in fact be instituted. *Id.* at 138.

In the instant case, as hereinbefore set forth, Petitioner was repeatedly advised of the consequences of its default by the Orders of the Bankruptcy Court and, at the hearing on Septem-

ber 12, 1978, Petitioner stipulated and agreed to the automatic forfeiture of its deposit it if did not close. It cannot be disputed that Petitioner was fully aware of the forefeiture if it defaulted and did not close the transaction. As documented in the chronology of Orders and hearings, Petitioner knew for more than four months prior to the actual forfeiture of its $500,00 deposit that forfeiture would occur in the event of its default.

Also, this Court, in *Bank of Marin, supra,* discussed the application of equitable principles in the exercise of Bankruptcy jurisdiction. In the instant case, equity dictates that Respondent be allowed to retain Petitioner's deposit under the Orders of the Bankruptcy Court, the terms of the contract for purchase and sale and Petitioner's stipulation and agreement. Petitioner's attempts to now use its actions and the resulting consequences to construct a defense against forfeiture is abhorrent to all established equitable principles.

Petitioner's authorities concerning the requirement that a court's contempt order must be supported by an unequivocal command are likewise not applicable in the instant case. Petitioner, in its pleadings prior to forfeiture, admitted that forfeiture would occur under certain conditions, including its failure to close. There was no confusion as to what would happen to the $500,000 deposit if Petitioner defaulted and did not close.

Finally, the decisions in *In Re Huguenot Publishing Company, Inc.*, 83 F.2d 258 (2d Cir. 1936), and *In Re Rival Knitting Co., Inc.*, 289 F. 2d 960 (2d Cir. 1923), are not relevant to a consideration of the instant facts. These cases involved judicial sales and whether a defaulting purchaser may be liable for the difference between his bid and the proceeds on resale where there has been no notice to the defaulting purchaser. Unlike the instant cause, these cases involved separate proceedings to enforce the contract or award a deficiency amount as damages. Proof of the amount of damages to be charged against the defaulting purchaser was required. The instant case involves a

liquidated damages provision and no determination of an amount of damages was needed. Also, the facts establish to an absolute certainty that Petitioner was given ample notice of the automatic forfeiture of its deposit.

CONCLUSION

Petitioner would have this Court believe that it was an innocent purchaser, victimized by the threats of the Bankruptcy Judge and Respondent's inability to perform under the contract. The facts in the instant case, however, simply do not support Petitioner's arguments and certainly, do not provide a basis for the grant of a Writ of Certiorari. The opinions and orders of the United States Court of Appeals for the Fifth Circuit, the United States District Court for the Middle District of Florida and the Bankruptcy Court are correct and supported by the facts and applicable law and should not be reviewed by this Court. Respondent prays that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

DOUGLAS B. BEATTIE, ESQUIRE
COLLING & BEATTIE, P.A.
Suite 500, Pan American Bank Building
Orlando, Florida 32801
(305) 843-2684
Attorney for Respondent

CERTIFICATE OF SERVICE

I, Douglas B. Beattie, hereby certify that on this _____ day of January, 1982, copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were furnished by mail, correct postage prepaid, to Johnie A. McLeod, Esquire, P.O. Drawer 950, 38 East Main Street, Apopka, Florida 32703, Attorney for Petitioner.

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(305) 843-2684
Attorney for Respondent

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 74-383-ORL-BKPT-P

In the Matter of:
ALDERSGATE FOUNDATION, INC.,
Debtor.

ORDER ON MOTION FOR REHEARING

THIS CAUSE came before the Court on the motion filed by Friendly Retirement Center, Inc. (hereafter "Friendly"), Estill Brewer, Mary Brewer and Brewer Omega Corporation (formerly known as Omega Corporation), seeking a rehearing on that portion of the Order entered by the Court on September 13, 1978 which required Friendly, within forty-five calendar days from the date of that Order, to file an irrevocable letter of credit or a letter of commitment from an approved lending institution in the full amount of the purchase price approved by this Court for the purchase of the Kissimmee property by Friendly.

The Court having heard oral argument from the attorneys for the Trustee, ComBank/Winter Park, Friendly and the Brewers, hereby grants the motion for a rehearing and amends its Order dated September 13, 1978 in the following respects:

1. The requirement that Friendly deliver an irrevocable letter of credit or a letter of commitment by an approved lending institution within forty-five calendar days from September 13, 1978 is hereby stricken.

2. Friendly is directed to execute the Contract For Sale And Purchase covering the Kissimmee property in the form previously tendered by the Trustee, with the deletion of only that provision which required Friendly to deliver an irrevocable letter of credit or letter of commitment within forty-five calendar days from September

13, 1978. If Friendly has not executed this Contract For Sale And Purchase and delivered it to the Trustee by 5:00 P.M. on October 6, 1978, it shall be deemed to have forfeited the $500,000 deposit heretofore made by Friendly, which deposit has been ordered by this Court to be treated as a forfeitable earnest money deposit.

3. Friendly shall proceed to closing and close this transaction on or before December 12, 1978. The Court reiterates that portion of its prior Order which provided that the Court would not consider under any circumstances any extensions or requests for extensions of the time to close this transaction.

DONE AND ORDERED in Chambers in Tampa, Florida this 6th day of October, 1978.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Bankruptcy Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this 6th day of October, 1978 to the parties listed on the attached Schedule A.

/s/ Sprague

SCHEDULE A

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Scott Johnson
Darryl Bloodworth
Robert Roth

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 74-383-ORL-BKPT-P

In the Matter of:
ALDERSGATE FOUNDATION, INC.,
Debtor.

MOTION FOR REHEARING OF ORDER ENTERED SEPTEMBER 13, 1978

COME NOW Estill Brewer, Mary Brewer and Brewer Omega Corporation, formerly known as Omega Corporation (the "Brewers") creditors in the above entitled matter, being the owners of two promissory notes issued by Aldersgate Foundation, Inc. ("Aldersgate") in the aggregate amount of $1,287,000 and accrued interest to February 28, 1977 of $143,000 and $7500 principal amount of First Mortgage Bonds issued by Aldersgate secured by the Kissimmee property, and Friendly Retirement Center, Inc., ("Friendly") who, with the Brewers, have participated in this proceeding as hereinafter stated, by their undersigned counsel and move this Honorable Court for a rehearing and reconsideration of its order entered September 13, 1978, and state unto the Court as follows:

1. On August 24, 1978 the Bankruptcy Court entered an order in which the Friendly bid of $11,480,200.00 was "tentatively" approved provided that Friendly submit its bid in writing and further provided that the International Properties Group ("Baskin") may improve his bid of $11,000,100.00 on or before 11:00 a.m., August 30, 1978 in an amount that exceeds Friendly's bid by at least $100,000.00; the said order provided "that the bid submitted by Friendly in the amount of $11,480,200 is the highest bid and best bid

for the Kissimmee property and is hereby approved by the Court subject only to the following matters and things:"

1. Friendly shall confirm the bid in writing.
2. Friendly shall, within ten days from the date of the approval of the sale, make an additional deposit with the Trustee Reed of $450,000 (Friendly having deposited $50,000 with its bid).
3. A contract of sale should be negotiated between Friendly and the Trustee, Reed.
4. Baskin was authorized to submit a higher bid on or before August 30, 1978 at 11:00 a.m. at which time a further hearing was set.

2. Friendly confirmed the bid in writing and proceeded to negotiate contract terms with the Trustee's counsel, Mr. Colling.

3. Friendly deposited the additional $450,000 with the Trustee making a total good faith deposit of $500,000 in support of its bid.

4. At the 11:00 a.m. hearing before the Bankruptcy Court on August 30th Baskin announced that his bid could not and would not be increased; on the basis of that statement the contract should have been awarded to Friendly as the Court's order of August 24, 1978 provided.

5. As a result of the hearing of August 30, 1978 the Bankruptcy Court entered an order on August 31, 1978 again "tentatively" approving the Friendly bid but changing and revising its order of August 24, 1978; the August 31st order required Friendly to deposit cash or cashier's check with the Trustee in the amount of $450,000 on or before 5:00 p.m., September 1, 1978, which was the next day; Friendly made such deposit in compliance with the Court's Order of August 24, 1978; the order of August 31st also provided that on or before September 9, 1978, (nine days thereafter, with the Labor Day weekend included within the time) Friendly should provide to the Trustee proof of its ability to perform its bid by submitting a written commitment from an "approved" lending institution to fund the full purchase price of $11,480,200; the order also stated that if Friendly

did not comply within the nine day period the bid would go to the lower bidder, Baskin, but Baskin was not required to furnish the documents required of Friendly.

6. Friendly requested a rehearing of the Court's order of August 31, 1978 as the terms thereof were harsh, impractical and unrealistic and the Trustee "vigorously" opposed the motion but the Court granted same "in light of the fact that a deposit actually made by Friendly to-wit: the sum of one-half million dollars is a sufficient earnest money deposit." However, the Court's order of September 13, 1978, on the rehearing, provided that Friendly's deposit of $500,000 shall be "forfeited" if Friendly does *not:*

1. File with the Court on or before September 18, 1978 (five days after the order) a loan commitment which shall be irrevocable for 90 days from the date of the order in the amount of $8,500,000; Friendly has complied with this provision of the Court's order.
2. File within 45 days from the date of the order an irrevocable letter of credit valid for 90 days from the date of the order in an amount sufficient to pay the full purchase price;
3. Friendly shall close the transaction within 90 days from the date of the order, to-wit: September 13, 1978.

7. Friendly has in good faith tried to demonstrate its ability to proceed with the sale and the consummation thereof which it can and would do; its deposit of $500,000 should be sufficient to show its intention in that regard.

8. It is unrealistic in the conduct of business affairs and a very harsh mandate directed at Friendly for the Court to require a commitment from a lending institution within 45 days for the full amount of the purchase price or forfeit its deposit. To obtain such commitment requires an initial outlay of funds and fees and it is contrary to good business judgment to order such commitment prior to the time Friendly and the Trustee have agreed on the terms of the Contract of Sale and duly executed the same.

9. Friendly wishes to assure the Court that it can and will obtain an appropriate commitment that will enable it to acquire the property at the price of $11,480,200.00 the amount of its offer.

10. Friendly expended $80,750 as a fee to obtain a 90 day extension of its loan commitment in the amount of $8,500,000 referred to above in paragraph 6 and in the Court's order of September 13, 1978.

11. Friendly urges however that the 45 day limitation in the Court's order of September 13, 1978 is most harsh and unfair in the light of the magnitude of this transaction; note please the letter hereto annexed dated September 20, 1978 from UFA addressed to Rev. Thomas of Friendly.

12. Friendly requests of the Court in all good faith to permit the Trustee and Friendly to enter into a contract of sale which permits a closing on or before 120 days from September 13, 1978; Friendly believes the sale would close in 90 days from such date but respectfully submits that better business judgment suggests that an additional 30 day leeway would be more comfortable for both the Trustee and Friendly.

13. This is a very large and important acquisition not only from Friendly's point of view but also in view of the cash to be distributed to the Kissimmee bondholders and the impact of the sale on the pending bankruptcy proceeding.

WHEREFORE, the Court is requested to grant the rehearing and amend its order of September 13, 1978 to state that Friendly is to have 120 days from the date of said order to close said sale.

/s/ JOHNIE A. MCLEOD
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Attorney for the Brewers and
Friendly Retirement Center, Inc.
P.O. Drawer 950
38 East Main Street
Apopka, Florida 32703
Telephone: (305) 886-3300

Dated: September 25, 1978

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the annexed Motion has been furnished by mail this 25th day of September, 1978 to the following:

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UNITED FINANCIAL OF AMERICA, INC.

September 20, 1978

Rev. Arthur Thomas
R.D. #1, Box 61A
Middleburg, Pa. 17842

Re: Aldersgate Project

Dear Rev. Thomas:

Regarding your purchase of Aldersgate and in connection with our handling of the financing of the project we would like to comment on the Court Order of the United States District Court, Middle District of Florida in Bankruptcy, as well as your contract with the trustee. We find them to conform to our understanding. However, the Court Order raises one major problem. The Order provides that you are to furnish the Court within 45 days from the date of the Order, which is 38 days from now, an irrevocable letter of credit in an amount sufficient to pay the entire purchase price. It is just not feasible, from our experience, to produce such a financial commitment within a 38 day time span. The Court Order provides for a closing of the transaction within 90 days and that is a satisfactory and reasonable time frame. We have discussed with the lender the idea of increasing the $8,500,000 commitment and it appears that we will be able to do so. However, before formal action can be taken to increase the $8,500,000 commitment that we already have, we must be furnished with an up-dated M.A.I. appraisal, income and expense figures from a Certified Public Accountant, as well as current occupancy figures for Aldersgate. Realizing that it will take some time to assemble these materials makes it even more unlikely that a commitment for increased financing can be obtained within 38 days because we will not have these materials to deliver to the lender for several days and possibly even longer. Consequently, there will be a good deal less time than even 38 days for producing the financial commitment that the Court Order requires and for a commitment of the magnitude of this one we will not be giving our investor enough time.

We would respectfully suggest that since you already have placed $500,000 with the Court in the form of a non-refundable deposit, that you request a modification of the Court's Order eliminating the requirement for the irrevocable letter of credit within 45 days and the Order should simply provide that the purchase will be closed within 90 days from the date of the Court Order.

Sincerely,

/s/ MICHAEL J. DASPIN
Michael J. Daspin
Counsel

MJD/pgs
cc: Johnie A. McLeod, Esq.

the hartford building/200 e. robinson st./p.o. box 1987/orlando, florida 32802/(305) 423-5901

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
IN BANKRUPTCY, ORLANDO DIVISION

Case No. 74-383-Orl-Bk-P

In the Matter of:
ALDERSGATE FOUNDATION, INC.,
Debtor.

ORDER ON MOTION FOR REHEARING

THE MATTER under consideration is a Motion for Rehearing and Reconsideration filed by Friendly Retirement Center, Inc. (Friendly), Estill Brewer, Mary Brewer and Brewer Omega Corporation, formerly known as Omega Corporation (the Brewers). The Motion is addressed to a previous Order entered by this Court on August 31, 1978 which entered a bid of Friendly to purchase a retirement center located in Kissimmee, Florida, formerly referred to in this proceeding as the Kissimmee property. The Order which approved Friendly's bid directed Friendly to deposit with the trustee an additional sum of $450,000 on or before September 1, 1978 and to furnish to the trustee an irrevocable letter of credit or a written loan commitment from an approved lending institution in the amount of the full purchase price less the amount of the deposit.

Friendly now seeks a modification of this Order by relieving it of the obligation of the requirement of furnishing a letter of credit or a loan commitment; but offers to make an additional cost deposit of $650,000 to be paid on or before October 2, 1978. The Court heard argument of counsel for the respective parties including the trustee, who vigorously opposes the Motion, and who also filed a response to the motion. It is the considered opinion of this Court that in light of the fact that the estate no longer has an alternative bid and in light of the fact that a deposit actually made by Friendly to wit the sum of one-half million dollars is a sufficient earnest money deposit, the Motion for

Rehearing is granted and upon reconsideration the Order of August 31, 1978 is amended in the following respects.

First, the deposit heretofore made by Friendly is deemed to be and is treated as a forfeitable earnest money deposit and shall be forfeited in the event of a default; which default occurs if Friendly is unable to meet the remaining terms and conditions of the purchase which are as follows.

1) Friendly shall file with the Court, along with a copy to the trustee, on or before September 18, 1978 5:00 p.m., an effective loan commitment which shall remain valid and outstanding and irrevocable for ninety net calendar days from the date of the entry of this order in the amount not less than the amount of a previous loan commitment filed in this proceeding by First Federal of Seminole.

2) Within forty-five net calendar days from the date of the entry of this Order, Friendly shall file an irrevocable letter of credit valid for not less than ninety net calendar days from this date in the amount, sufficient to pay in full the entire purchase price approved by the Court upon closing or in the alternative, a letter of commitment from an approved lending institution in the same amount and valid and enforceable for the same period of time as provided by the letter of credit mentioned above. Miscellaneous letters of recommendation like the ones heretofore submitted by Friendly, are not acceptable and will not satisfy the requirements imposed by this Order.

Lastly, Friendly shall proceed to closing and close the transaction on or before the expiration of the ninety net calendar days from the date of the entry of this Order. It is further

ORDERED, ADJUDGED AND DECREED that the Court will not consider under any circumstances any extensions or request for enlargement of time with regard to any of the dates specified herein.

DONE AND ORDERED in chambers in Orlando, Florida this 13th day of September, 1978.

/s/ ALEXANDER L. PASKAY
Alexander L. Paskay
Bankruptcy Judge

Petitioner's Reply Brief

No. 81-963

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of:
ALDERSGATE FOUNDATION, INC.,

FRIENDLY RETIREMENT CENTER, INC.,
Petitioner,

vs.

LEE JAY COLLING, Successor Trustee,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Ralph M. McDermid
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No. 81-963

IN THE
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OCTOBER TERM, 1981

In the Matter of:
ALDERSGATE FOUNDATION, INC.,

FRIENDLY RETIREMENT CENTER, INC.,

Petitioner,

vs.

LEE JAY COLLING, Successor Trustee,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioner stands by its original Statement of the Case and of the Facts,

and its Reasons for Granting the Writ. Petitioner takes exception to Respondent's contentions that Petitioner stipulated and agreed to the conditions of forfeiture and had an opportunity to object to the actual forfeiture at the bankruptcy hearing on January 2, 1979.

ARGUMENT

Respondent's Brief in Opposition ignores the crux of Petitioner's argument, to wit, Petitioner was deprived of *adequate* notice and the opportunity to be heard prior to the forfeiture of its $500,000 earnest money deposit. Respondent contends that "Petitioner knew for more than four months prior to the actual forfeiture of its $500,000 deposit that forfeiture would occur in the event of its default." (Respondent's Brief, p. 10). Notice sufficient to satisfy the requirements of

due process cannot be measured in quantitative terms. *See, Greenfield v. Villager Industries, Inc.*, 483 F.2d 824 (3d Cir. 1973). Because a forfeiture was forewarned in September and October, 1978, does not obviate the right to notice upon the happening of the threatened event and an opportunity for a hearing before the deprivation takes place. Unquestionably, Petitioner was denied these rights prior to forfeiting its $500,000 deposit.

Respondent further contends that Petitioner was not only aware that it would forfeit the $500,000 deposit upon default, but also that Petitioner stipulated and agreed to that condition of forfeiture in order to persuade the Bankruptcy Court to accept its bid and favorably consider its numerous requests to extend the time for closing. (Respondent's

Brief, p. 6). This contention neither reflects Petitioner's motivations nor is it an accurate representation of the facts.

Petitioner understood that a forfeiture would occur only if it failed to execute a Contract for Sale and Purchase by October 6, 1978. (Petitioner's Appendix I). As previously stated, Petitioner complied with this order of the Bankruptcy Court by executing the Contract for Sale and Purchase. (Petitioner's Appendix H). Contrary to Respondent's position, Petitioner did *not* stipulate and agree to any *other* conditions of forfeiture through the Bankruptcy Court's Orders of September 13, 1978 (Respondent's Appendix C), and October 6, 1978. (Petitioner's Appendix I). These orders simply did not give clear notice that forfeiture would in fact occur upon the

failure to close on a specified date.

Respondent suggests that by accepting the conditions of these two orders Petitioner waived its right to a hearing. A waiver of constitutional rights in any context must, at the very least, be absolutely clear. *Fuentes v. Shevin*, 407 U.S. 67, 95 (1971). The language of the orders in no way implicates Petitioner's waiver of the right to a hearing to determine whether the conditions of a one-half million dollar forfeiture *had in fact occurred* and to consider any available defenses. It is preposterous to assume that Petitioner stipulated and agreed to conditions of a forfeiture of which Petitioner had no adequate notice and that by doing so Petitioner waived its constitutional right to a hearing.

Finally, Petitioner takes exception

to Respondent's statement that Petitioner's counsel was present at the bankruptcy hearing held on January 2, 1979, and had an opportunity to speak at that hearing, but remained silent, did not object to the forfeiture, did not assert any defenses, and did not request a hearing on the forfeiture. (Respondent's Brief, pp. 6-7). First, it should be noted that Petitioner was *not* represented by counsel at that hearing. In an order dated April 19, 1979, the court reporter was authorized to correct the transcript of the January 2, 1979, hearing to disclose that Johnie A. McLeod, Ralph McDermid and Robert H. Roth appeared at that hearing on behalf of the Brewers and not Petitioner. (Petitioner's Appendix G). Moreover, that hearing was called for the purpose of confirming Respondent's Plan of Reorganization, and no notice was ever given

that the subject of forfeiture would be raised. Without any notice whatsoever that the subject of forfeiture would be raised at that hearing, Petitioner's opportunity to defend was rendered meaningless. *Schleper v. Ford Motor Company, Automotive Division*, 585 F.2d 1367 (8th Cir. 1978). As this Court has recognized, the opportunity to be heard is of

> little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Respondent's arguments are premised on the contentions that Petitioner had notice and waived its right to defend. Petitioner had no meaningful opportunity to defend nor adequate notice. As stated by one court:

> [J]ust as a hearing which does not afford a meaningful opportunity to be heard may be as fatal to due process as a denial of any hearing at all, so too constitutionality mandated notice which is inadequate under the circumstances may be as fatal to due process as no notice at all.

Greenfield v. Villager Industries, Inc., 483 F.2d 824, 834 (3d Cir. 1973).

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the opinions and orders of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 4, 1981 (Petitioner's Appendix A) and on October 15, 1981 (Appendix B), and of the United States District Court for the Middle District of Florida entered on August 14, 1980 (Appendix C), and

January 12, 1979 (Appendix F).

Respectfully submitted,

/S/ JOHNIE A. McLEOD
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Ralph M. McDermid
Of Counsel

I, Johnie A. McLeod, hereby certify that on this 17th day of February, 1982, copies of the foregoing Reply Brief were furnished by mail, correct postage prepaid, to Douglas B. Beattie, Esquire, 500 Pan American Bank Building, Orlando, Florida 32801, Attorney for Respondent.

/s/ JOHNIE A. McLEOD

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